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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
MARYLAND.

BY RICHARD W. GILL, *Attorney at Law,*
AND
JOHN JOHNSON, *Clerk of the Court of Appeals.*

VOL. III.
CONTAINING CASES IN 1830-31-32.

HERRICK & ALLEN

Baltimore:
PUBLISHED BY WILLIAM & JOSEPH NEAL.
PRINTED BY JAS. LUCAS AND E. K. DEEVER.
1832.

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NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

OF THE COURT OF APPEALS.

Hon. JOHN BUCHANAN, Chief Judge.
Hon. RICHARD TILGHMAN EARLE, Judge.
Hon. WILLIAM BOND MARTIN, do.
Hon. JOHN STEPHEN, do.
Hon. STEVENSON ARCHER, do.
Hon. THOMAS BEALE DORSEY, do.

OF THE COURT OF CHANCERY.

Hon. THEODORICK BLAND, Chancellor.

OF THE COUNTY COURTS.

FIRST JUDICIAL DISTRICT—*St. Mary's, Charles and Prince George's Counties.*

Hon. JOHN STEPHEN, Chief Judge.
Hon. EDMUND KEY, Associate Judge.
Hon. JOHN ROUSBY PLATER, do.

SECOND JUDICIAL DISTRICT—*Cecil, Kent, Queen Anne's and Talbot Counties.*

Hon. RICHARD TILGHMAN EARLE, Chief Judge.
Hon. LEMUEL PURNELL, Associate Judge.
Hon. PHILEMON B. HOPPER, do.

THIRD JUDICIAL DISTRICT—*Calvert, Anne Arundel and Montgomery Counties.*

Hon. THOMAS BEALE DORSEY, Chief Judge.
Hon. CHARLES J. KILGOUR, Associate Judge.
Hon. THOMAS H. WILKINSON, do.

FOURTH JUDICIAL DISTRICT—*Caroline, Dorchester, Somerset and Worcester Counties.*

Hon. WILLIAM BOND MARTIN, Chief Judge.
Hon. ARA SPENCE, Associate Judge.
Hon. WILLIAM TINGLE, do.

FIFTH JUDICIAL DISTRICT—*Frederick, Washington and Allegany Counties.*

Hon. JOHN BUCHANAN, Chief Judge.
Hon. ABRAHAM SHRIVER, Associate Judge.
Hon. THOMAS BUCHANAN, do.

SIXTH JUDICIAL DISTRICT—*Baltimore and Harford Counties.*

Hon. STEVENSON ARCHER, Chief Judge.
Hon. CHARLES W. HANSON, Associate Judge.
Hon. THOMAS KELL, do.

OF BALTIMORE CITY COURT.

Hon. NICHOLAS BRICE, Chief Judge.
Hon. WILLIAM McMECHEN, Associate Judge.
Hon. ALEXANDER NISBET, do.

ATTORNEY GENERAL.

JOSIAH BAYLEY, Esquire, appointed Attorney General of Maryland, 22d July, 1831, *vice*
ROGER B. TANEY, Esquire, resigned, and appointed Attorney General of the United
States

STATE OF NEW YORK

IN SENATE,

January 10, 1894.

REPORT

OF THE

COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
JANUARY 10, 1894.
ALBANY:
J. B. LEECH, STATE PRINTER,
1894.

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CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
MARYLAND.

DECEMBER TERM, 1830.

OWINGS, et al. vs. OWINGS.—December, 1830.

An appeal from a decree of the Chancellor cannot properly be taken; after the death of the only complainant in the cause, in the name of such complainant; and neither the appearance of the representatives of the deceased party, after a suggestion of the death in the appellate court, nor the appearance of the other party there, cures the defect. The court on motion dismissed such an appeal.

The Act of 1785, ch. 80, sec. 1, (to prevent the abatement of actions) does not apply to causes in the appellate court.

The Acts of 1806, ch. 90, sec. 11, and 1815, ch. 149, sec. 5, 6, relate to causes in the Court of Appeals, but neither of them relates to an appeal prayed from Chancery in the name of a deceased person.

APPEAL from the Court of Chancery. Motion to dismiss the appeal.

In this case a bill was filed on the 21st of May, 1825, by *Colegate D. Owings*, against the appellee, *Charlotte C. D. Owings*.

On the 20th February, 1828, *Bland*, Chancellor, decreed in favor of the defendant, from which decree, an appeal was taken, to the then ensuing *June* term of the Court of Appeals, in the name of the complainant, *Colegate D. Owings*.

The facts of the case are sufficiently stated by the Judge who delivered the opinion of this Court.

Owings, *et al.* vs. Owings.— 1830.

The motion was argued before BUCHANAN, Ch. J., MARTIN, and STEPHEN, J.

Johnson, for the appellant.

By the appearance of the appellee, the objection to the irregularity of the appeal is waived.

If the appellee had not appeared, the appeal would have been discontinued, and a new appeal taken within the time required by law, by the proper parties. That time having now elapsed, the appellants are without remedy, if the present appeal is dismissed. He referred to the Acts of 1806, *ch.* 90, *sec.* 11, and 1815, *ch.* 149, *sec.* 5, 6.

Scott supported the motion.

BUCHANAN, Ch. J., delivered the opinion of the court.

This case is brought before us, on a motion to dismiss the appeal.

The decree of the Chancellor, which it is sought to have reviewed in this court, was passed on the 20th February, 1828, in favor of the defendant. From that decree, an appeal was prayed by the solicitor, for *Colegate D. Owings*, (who had been complainant in Chancery,) on the 14th of March, 1828, which was allowed, and the record was brought up to the *June* term, 1828, when there was an appearance of counsel for *Charlotte C. D. Owings*, the defendant. At the same term, a motion to dismiss the appeal, appears to have been entered. On the 18th of November, 1828, an affidavit of the death of *Colegate D. Owings*, was filed, in which it is stated, that she died on the 1st *March*, 1828, before the appeal was prayed, and at the *June* term, 1829, the heirs at law of *Colegate D. Owings*, appeared in the case to prosecute the appeal.

The motion to dismiss the appeal is founded on the fact, supported by affidavit, that the nominal appellant, *Colegate D. Owings*, was dead at the time the appeal was prayed, and that the record was improperly brought up; and the question is, whether the objection to the case being entertained, has been removed, either by the appearance of coun-

sel for the defendant, or of the heirs at law of *Colegate D. Owings*?

It has been decided in *Roche vs. Johnson and wife*, by this court sitting on the *Eastern Shore*, at *June* term, 1806, that cases in this court are not within the provisions of the act of 1785, *ch.* 80, *sec.* 1. But if it was otherwise, and that act could be held to relate to suits in this court, this is not a case to which it could apply. That act provides against an action abating by the death of either party after suit brought, and authorises the appearance of those interested, but makes no provision for the case of a suit brought in the name of a dead person.

The acts of 1806, *ch.* 90, *sec.* 11, and 1815, *ch.* 149, *sec.* 5, 6, do relate to cases in the Court of Appeals, but neither of them embrace a case such as this. The former of those acts only providing, that if either of the parties to a cause in the Court of Appeals, shall die, after the cause has been put under rule argument, it shall not therefore abate, but that the court shall give judgment, as if such deceased party were alive. And the latter providing for the case of the death of an appellant, or plaintiff in error, *after* an appeal has been made, or writ of error brought, and directing that no appeal or writ of error shall *abate*, by the death of either party, if the heir, &c. of the deceased party, shall at the first or second term, succeeding the death, make the necessary suggestion, and appear to the appeal, or writ of error for the purpose of prosecuting or defending it; thus clearly not applying to this case, in which the appeal was made in the name of a person, not in *esse* at the time. But if, by any possible construction, it could be held to embrace the case of an appeal made in the name of a dead person, it would not have the effect to save this case; the provision being, that no appeal, or writ of error, shall abate by the death of either party, if the heir, &c. of the deceased party, shall at the first or second term succeeding the death, make the necessary suggestion, and appear, &c. so that the necessary corollary is, that the appeal or writ of error, will in

McLaughlin vs. De Young.—1830.

such case abate, if the heir, &c, of the deceased party shall not at the first or second term succeeding the death, make the necessary suggestion, and appear, &c. And not only was there no suggestion of the death in this case, by the heir of the deceased, but the appearance of the heirs was not until the third term after the death. So that if there had been an appeal properly depending in this court, it would regularly, have abated. But there was no appeal properly made, or depending here, and the mere appearance of the heirs of *Colegate D. Owings*, does not stand in the way of the motion to dismiss; their appearance being without authority, and the case standing, as if no such appearance had been entered. Nor has the objection been waived or obviated by the appearance of counsel for *Charlotte C. D. Owings*, which may have been only for the purpose of making the motion to dismiss, and could not have the effect, to render the mere sending up the record, and docketing the case in the name of one who was dead, a good and available appeal.

It was not a mere irregularity, but a complete and radical defect.

APPEAL DISMISSED.

McLAUGHLIN vs. DE YOUNG.—*December, 1830.*

Y sued out a writ in trespass upon the case against M, J R, and S, and filed a declaration, counting upon their note as co-partners. M, only was arrested. At the return term of the writ he pleaded as follows: "And the said M comes and says, that he is in no wise guilty of the trespass aforesaid, as the said Y above, complains against him; for plea he says, that the said W R, who in the said writ is called J R, one of the defendants, is dead, and that he died before the suing out of the said writ of the said M, to wit, at, &c. and this, &c. Whereupon he prays judgment of the writ aforesaid, and that it may be quashed." HELD, upon special demurrer, that this was a valid plea in abatement.

A plea in abatement of the writ, is one which shows ground for abating or quashing it, without at the same time denying the right of action itself; and if a plea begins in bar, though it contains matter in abatement, it will be treated as a plea in bar.

McLaughlin vs. De Young.—1830.

An informal or repugnant protestation does not on demurrer, vitiate a plea. The death of one of the parties named as defendant in a writ, before the imputation of it, is ground of abatement.

APPEAL from *Baltimore County Court*.

These were actions of *Assumpsit* brought by the appellee, *Meichel De Young*, against *Matthew McLaughlin*, *John Reed* and *William Simpson*, on the 27th *July*, 1826.

They were founded on promissory notes, which the defendants were alleged in the declarations to have made as co-partners in trade, under the firm of *McLaughlin, Reed and Simpson*.

The writs were returned by the sheriff, "*cepi*" "*Matthew*," "*non est*, the rest."

At the return term, the appellant, *Matthew McLaughlin*, appeared, and filed the following plea. "And the said *Matthew* comes and says, that he is in no wise guilty of the trespass aforesaid, as the said *Meichel* above complains against him, for plea he says, that the said *William Reed*, who in the said writ, is called by the name of *John Reed*, one of the defendants, is dead, and that he died before the suing out of the said writ of the said *Meichel*, to wit, at *Baltimore county* aforesaid, and this he is ready to verify; wherefore he prays judgment of the writ aforesaid, and that it may be quashed, &c."

The plaintiff demurred specially to this plea. 1st. "That it is defective in this, that it concludes by praying judgment of the writ, and that the same may be quashed, &c. whereas, it ought to have concluded by praying judgment, if the court will proceed any further." 2d. "That in it the said defendant says, that he is in no wise guilty of the trespass aforesaid, and it appears from the proceedings had before the said plea was put in, that the cause of action was in case, sounding in *assumpsit*, and not in trespass." 3d. "That it is double in this, that it alleges that the said defendant was not guilty of the trespass aforesaid, and also, that the said *William Reed*, who in the said plea, is called *John Reed*, died before the suing out of the said writ."

McLaughlin vs. De Young.—1830.

4th. "That it is both in bar, and abatement." 5th. That it begins as a plea in bar."

The defendant joined in demurrer, and the judgments of the County Court being against him, he prosecuted the present appeals.

The causes were argued before BUCHANAN, Ch. J., and EARLE, MARTIN, STEPHEN, and DORSEY, J.

Scott, for the appellant, contended, that as the sufficiency of the subject matter of the plea, was admitted by the demurrer, the only question was, is it well pleaded in point of form? and he insisted that it was properly pleaded.

Gill, for the appellee, referred to 2 *Harr. Ent.* 301. 1 *Chitty's Plead.* 445. 1 *Saund. Plead. Ev.* 13. 1 *Stephens' Plead.* 65, 66. 1 *Chitty's Plead.* 439, 440, 450, 445, 446. 2 *Saund. Rep.* 209, a (note.) 3 *Term Rep.* 185.

BUCHANAN, Ch. J., delivered the opinion of the court.

A plea in abatement of the writ, is one which shows ground for abating or quashing it, without at the same time denying the right of action itself; and if a plea begins in bar, though it contains matter in abatement, it will be treated as a plea in bar. But this plea is not obnoxious to the objection raised to it, that it begins in bar. It seems to have been literally copied from a plea of the same kind in *Wentworth*, and although it is headed by the word, "says that he is in no wise guilty of the trespass aforesaid, as the said *Meichel* above complains, against him," yet they are not to be considered and treated as if introduced as a material part of the plea itself, but only by way of informal protestation, which is clearly shown by the next succeeding words, "for plea says," &c. and in *Story on Pleading*, we find the same plea with the same matter prefixed with this difference only, that it is set out in the shape of a more formal protestation. And it is not a material objection to the plea, either that it is informal, as

a protestation, or that the writ is treated as a writ in trespass, when it appears from the declaration to be an action of *assumpsit*, a protestation being wholly immaterial, and of no avail in the action in which it is used, but intended only to guard the party against being concluded in another action which it has in view. Hence, a repugnant, inconsistent, idle, or superfluous protestation, does not on demurrer vitiate the plea, whatever its faults of form may be. Treating this then, as an informal protestation, wholly immaterial to the action, and not in other respects vitiating the plea, it does not infect it with duplicity, as is supposed by the demurrer.

The death of one of the parties named as a defendant in the writ, before the impetration of it, is not only proper matter of abatement, but sufficiently pleaded, the words "the said," introduced into the plea, showing *William Reed*, the person alleged to be dead, and the person named in the writ, *John Reed*, to be one and the same. And it is clearly no cause of demurrer, that the plea concludes with the prayer, that the writ may be quashed; it is the only proper conclusion of such a plea in abatement, and is not like the case of a plea in abatement, to the person of the plaintiff or defendant, showing a personal disability in one or the other, to sue or be sued, as that the plaintiff for example, is an alien enemy. Pleas of that character not falling strictly within the definition of pleas in abatement, do not "pray that the writ may be quashed," but "if the plaintiff ought to be answered, &c." But a plea of the character of this, strictly in abatement, showing a ground for quashing the original writ, properly concludes by praying "that the writ may be quashed."

The demurrers to the pleas, ought, we think, to have been overruled, and for that reason

JUDGMENTS REVERSED.

State of Maryland vs. Dent.—1830.

STATE vs. JOHN, *alias* JACK DENT.—December, 1830.

In an indictment for an assault with intent to murder, it is not necessary to state the instrument, or means made use of by the assailant, to effectuate the murderous intent.

The means of effecting the criminal intent or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence for the jury to demonstrate the intent, and not necessary to be incorporated in an indictment.

Error to the *City Court* of *Baltimore*.

The defendant in error, was tried on the following indictment, in *Baltimore City Court*, at *June* term, 1830.

“State of *Maryland*, City of *Baltimore*, to wit :

The jurors of the State of *Maryland*, for the body of the city of *Baltimore*, do upon their oaths present, that *John Dent*, late of the city aforesaid, negro, otherwise called *Jack Dent*, on the 15th day of April, 1830, with force and arms, at the city aforesaid, in and upon one *Joseph Daiger*, then and there being one of the constables of the city of *Baltimore*, and in the execution of his the said *Joseph's* duty as such, and in the peace of *God*, and of the said State, then and there being, did make an assault, with the intent him the said *Joseph Daiger*, then and there feloniously, wilfully, and of his malice aforethought to murder, contrary to the form of the act of assembly in such case made and provided, and against, &c.”

The second *count* was for a common assault and battery.

The defendant pleaded not guilty, and there was a general verdict of guilty, upon both counts of the indictment, when a motion was made in arrest of the judgment.

1st. Because, “the averment that *Daiger* was in the due execution of his office, is not made with *time* and *place*.”

2d. “The means with which the assault was made, to carry into effect the intent, are not stated.”

The *City Court* pronounced the following judgment:

“The *first* reason is not supported. On examination of the indictment it will be found, that the time and place in both counts, are correctly averred. The motion on this ground, is therefore overruled.

The *second* reason, we think, is well founded. The act of assembly does not affect the form of the indictment, or the evidence necessary to support it, but leaves both as at common law, only changing the nature of the punishment. The offence is still a misdemeanor. The only question therefore, is, whether the means or instrument by which the intention was to be effected, ought to have been stated in the indictment. And we think they ought to have been. In ordinary cases of assault, the means, or instrument of inflicting the injury, are mere matters of aggravation, and therefore may be inserted or omitted, without detriment. But it is otherwise, where the assault is accompanied by an intention to commit murder. In that case, the means or instrument used, are material and necessary in the description of the offence, as they indicate the malicious intention of the party, and must therefore be stated as well in this case, as where the crime has been consummated; and for this plain reason, amongst others, because in both, the adequacy of the means, as well as their use must be proved before the party can be convicted, and no evidence should be received of them, unless they are stated in the indictment. It will be found on recurrence to *Chitty*, *Starkie*, and *Archbold*, that all the precedents of indictments at common law, for offences of this kind, are in conformity to this opinion. The court therefore *arrest* the judgment on the *first count*, but direct the clerk to enter it upon the *second*."

The present writ of error, was thereupon prosecuted by the State.

The case was argued before BUCHANAN, Ch. J., and EARLE, STEPHEN, and DORSEY, J.

Taney, (Attorney General,) and *Gill*, for the State, contended, that an indictment for an assault with intent to murder, under the act of 1809, *ch.* 138, is sufficiently certain, which charges the assault to have been made with that intent. That in such case neither the special manner of the

assault, nor the circumstances from which the particular intent, may be inferred, need be stated.

They referred to the act of 1809, *ch. 138, sec. 4.* 3 *Chitty's Cri. Law*, 569, 591. *State vs. Cassel*, 2 *Harr. and Gill*, 410. 1 *East. Cr. Law*, 411. 3 *Johns. Rep.* 511. 1 *Stark. on Plead.* 98, 102.

No counsel argued for the defendant in error.

STEPHEN, J., delivered the opinion of the Court.

This case comes up on a writ of error to *Baltimore City Court*, and the sole question which it presents for the decision of this court is, whether according to the principles of criminal pleading, it is necessary in an indictment for an assault with intent to murder, to state in the indictment, the instrument, or means made use of to effectuate the murderous intent. It is incontrovertibly true, that the main object of all pleadings, both civil and criminal, is to apprise the party charged, of the nature of the case, to which he is called upon to respond, so that he may not be taken by surprise, and that he may come prepared to defend himself against the allegations of the opposite party. But we do not think that the principles of criminal jurisprudence require in this case, any thing more than that the offence should be charged in the language of the statute by which it is created. The indictment in this case, is founded upon the act of 1809, commonly called the penitentiary law—the offence as defined, and prohibited by that law is an assault with intent to murder. This is the character given to the assault charged in this indictment. It is averred that it was committed with intent to murder, and such averment we consider to be a full compliance with the requisitions of the law. The means of effecting the criminal intent, or the circumstances evincive of the *quo animo*, with which the act was done, are considered to be more properly, matters of evidence for the jury, to demonstrate the intent, than proper to be incorporated into the indictment; because that intent may be proved or illustrated by such a variety

of circumstances, as it would be very inconvenient, at all times, to embody in the indictment, or place upon the record; and if the means adopted, are necessary to be stated, it would seem to follow as a necessary consequence, that all the means, however multifarious, should be explicitly averred. Sir *Matthew Hale* observes 2 *P. C.* 193, "That in favor of life, great strictnesses have been in all times required, in points of indictments; and the truth is, that it is grown to be a blemish and inconvenience in the law, and the administration thereof. More offenders escape by the over easy ear given to exceptions in indictments, than by their own innocence; and many times gross murders, burglaries, robberies, and other heinous and crying offences, escape by these unseemly niceties, to the reproach of the law, to the shame of the government, and to the encouragement of villainy, and to the dishonor of *God*; and it were very fit, that by some law, this overgrown curiosity and nicety, were reformed, which is now become the disease of the law, and will, I fear, in time, grow mortal, without some timely remedy." It must be admitted, that there is much good sense in the above remarks, which are entitled to great weight, when it is considered that they proceeded from one of the most enlightened, humane, and christian judges, that ever graced or adorned the bench of *British* justice. That it is sufficient to charge the offence in the words of the prohibitory statute, will be found in 2d *Burr.* 1036, where the court says, "It is enough for the prosecutor to bring the case within the general purview of the statute upon which the indictment is founded, if that statute has general prohibitory words in it; for where an indictment is brought upon a statute which has general prohibitory words in it, it is sufficient to charge the offence generally, in the words of the statute."

In 3d *Johns. N. Y. Rep.* 511, the same principle is recognized, and affirmed when the court says, "The intent to commit

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murder, was here charged in the words of the statute, and we think that was sufficient.”

This indictment is for an assault and battery, and the *quo animo* was to be collected from the circumstances. It was enough to state with the usual precision, the facts requisite to constitute an assault and battery, and to aver the intent with which it was made. This intent might have been inferred, and proved from the declarations of the defendant, previous to the assault. The indictment required no other *facts*, than were necessary to establish an assault and battery. The crime charged, was after all, but a misdemeanor. It was not a felony, though the intent was to commit one. The same principle has been affirmed and established by this court, in the case of the *State vs. Cassel*, 2 *Harr. and Gill*, 407. Upon the whole, we think, that the facts and circumstances evincive of the murderous intent, are matters of evidence, to be submitted to the jury, and are not necessary to be charged in the indictment.

The judgment of *Baltimore City Court* is therefore reversed.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

JAMES McCORMICK, JR. vs. FAYETTE GIBSON, *et al.*
Dec. 1830.

The bar, arising from the act of limitations, relied upon in the answer of one co-defendant to a bill in Chancery, brought by a creditor against devisees, to recover his claim out of the real estate of a deceased debtor, upon the ground that the personal estate had been exhausted in the payment of debts, will not enure to the benefit of the other co-defendants, and authorise the Chancellor to dismiss the bill.

Upon a bill of this description, where the devisees have received distinct parcels of property, the interests of the defendants are several and distinct. The claim against each being in proportion to the amount devised to him.

APPEAL from Chancery.

This was a bill filed in the Court of Chancery on the 19th June, 1824, against the heirs, devisees and administrator, and purchasers from the heirs and devisees of *Jacob Gibson*, deceased, (the appellees,) by *James McCormick, Jr.* (the appellant.) The object of the bill was to enforce the payment of a promissory note of *Jacob Gibson*, dated the 18th October, 1817, payable five months after date, for \$2500, which had regularly come to the hands of the complainant by endorsement. The bill alleged the personal estate of the maker of the note to have been exhausted in the payment of debts; that this note had not been paid; that a large real estate of the deceased was in the possession of the defendants by his devise, and by purchase from his devisees, and prayed for a sale of the real estate, payment of the note, and for general relief. *Jacob Gibson* died on the 10th of January, 1818. Several of the defendants answered the bill, others, non-residents, were proceeded against by publication, &c. Among the answers was the following of *James Tilton*, who had intermarried with one of the devisees of the deceased.

“The separate answer of *James Tilton* to the bill of complainant aforesaid:

“This defendant, now, &c. says that he has no particular knowledge of the note alleged to have been executed by the said *Gibson*, to *Samuel Hughes*, or of the endorsements thereon; but if the same was executed and endorsed as alleged, he is advised that the debt was due more than three years before the filing of the aforesaid bill, and he pleads the act for the limitation of actions, in bar to the relief which is sought by the bill of complaint, and prays to have the benefit of the same at the final hearing. This defendant admits the death of the said *Jacob Gibson*, and that he made a will, as stated in the complainant’s bill, and admits the will as filed. The defendant, however, does not admit that the personal estate has been exhausted in a due course of administration; on the contrary, he de-

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nies that such is the fact, and he is advised that the heirs and devisees are not to be included or affected by any proceedings which may have been had at law against the executor of the said *Jacob Gibson*, and prays to be dismissed, &c."

None of the other answers relied upon the act of limitations. The execution of the note was proved, and the complainant had obtained judgment against the administrator. The final account of the administrator with the Orphans Court, showed the personal estate to have been exhausted, and did not show that the debt claimed here, had been paid. Several of the answers admitted the complainant's demand had not been paid.

On the 22d January, 1828, upon final hearing, BLAND, Chancellor, passed the following decree.

"This bill was filed on the 19th January, 1824, by *James McCormick, Jr.* to have the real estate of the late *John Gibson* sold, to satisfy a debt due to him, on the ground that *Gibson's* personal estate had been exhausted. The claim of the plaintiff is founded upon a promissory note, bearing date on the 18th October, 1817, given by the late *Jacob Gibson* to *Samuel Hughes*, payable five months after, and of which, by several endorsements, the plaintiff has become the holder.

In opposition to this claim, one of the defendants, *James Tilton*, in his answer, insists and relies upon the act of limitations as a bar, and it is quite clear, that this objection, when made by any one of the defendants, is as effectual as if it had been made by them all. There is nothing in the proof to take the case out of the act, and it has been established by the Court of Appeals, that a judgment against an executor, as such as that which has been obtained by this plaintiff against the executor of *Gibson*, cannot deprive the heirs of a deceased debtor of the right to take advantage of the act of limitation, as a bar." He therefore dismissed the bill with costs.

From this decree the complainant appealed to this court.

The cause was argued before BUCHANAN, Ch. J., MARTIN, and DORSEY, J.

Taney, (Attorney General,) and Scott, for the appellant, contended,

That the statute of limitations offered no defence to the claim of the complainant. Because, 1. The claim demanded was not due at the death of *Jacob Gibson*. 2. Not being due at the death of *Gibson*, and his personal estate having been exhausted in the payment of debts, there is no foundation for the plea of limitations. 3. *Jacob Gibson*, by his will, charged his estate with the payment of his debts, and made a devise of the remainder of his estate after the payment of his debts. 4. That *James Tilton* being a non-resident defendant, and absent, could not avail himself of the plea of limitations. 5. That *Tilton* not appearing and answering the bill before the time limited for his answering it, in the order of publication awarded against him as an absent defendant, could not plead limitations. 6. That admitting the plea of limitations, the complainant was entitled to a decree against the other defendants, and particularly against those defendants who did not deny the claim, but consented to a decree; and against those, who not answering, a decree *pro confesso* had been obtained. They cited 1 *Harr. and Johns*. 743. 2 *Ib.* 48. 4 *Ib.* 126. 2 *Harr. and Gill*, 323.

If a will directs debts to be paid, the statute of limitations cannot be pleaded. 8 *Com. Dig. (new ed.)* 719. *Blackway vs. Stafford*, 1 *Dick.* 48. *Harr. Dig.* 348. 1 *Sch. and Lef.* 413, 428, 431. 2 *Sch. and Lef.* 630. 1 *Ball and Beatt.* 119. 3 *Bac. Abri.* 460, 461. 10 *Johns. Rep.* 529, 538, 547.

In this case the interest of the defendants being several, the plea of one, if good as to him, cannot enure to the benefit of the others. These parties were not made defendants because they had a joint interest, but because, by the rules of Chancery, they must be brought before the court, having an interest, though a separate one.

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No counsel appeared for the appellees.

The opinion of the Court was delivered by DORSEY, J.

The only question which we are called on to consider is, was the complainant rightfully turned out of the Court of Chancery, on the ground that the plea of limitations by *James Tilton*, one of the defendants, is as effectual a bar to any relief "as if it had been made by them all." To sustain this broad and general principle, thus assumed by the Chancellor, as the basis of his decree, but two cases have been cited; viz. *Clason vs. Morris*, 10 *John*. 524, and *Lingan vs. English*, decided by this court at June term, 1830. Before this tribunal, *Clason vs. Morris*, (as far as the present question is concerned,) if an authority at all, can only be regarded as one of the lightest character. It was decided in the Court of Errors of *New York*, but partially composed of lawyers, by ten senators concurring in opinion with one judge of the Supreme Court, and five senators dissenting from that opinion; among the dissentient judges, we find (Chancellor, then Chief Justice,) *Kent*, *Thompson* and *Van Ness*, and with them senator *Platt*, subsequently a distinguished member of that court. When we contemplate the overwhelming preponderance in the number of judges of the Supreme Court, and perhaps of the legal talents of the Court of Errors, which dissented from the principle asserted in *Clason vs. Morris*, ought it not rather to be regarded as a case denying, than establishing the doctrine contended for. Justice *Spencer*, whose views were adopted by a majority of the senators, admits that he had met with no cases in equity to sustain his position; and he rests it wholly upon an unwarrantable analogy, between proceedings at law and in equity. "For, (says he) it is a well settled principle of law, that in actions upon contract, the plea of one defendant enures to the benefit of all, for the contract being entire, the plaintiff must succeed upon it against all or none: and therefore, if the plaintiff fails at the trial upon the plea of one defendant, he can-

not have judgment against those who let judgment go by default." But does such rigid formality exist in Courts of Chancery, or is it at all consistent with the principles and practice by which those tribunals are regulated? Must the complainants succeed against all or none? Every day's experience gives the negative to these inquiries. A decree may give joint relief to both complainants, or separate and distinct relief to each. As to one, the bill may be dismissed; whilst full relief is granted to the other. The same principle applies to defendants. Joint relief may be granted against both; a separate and distinct relief against each. The bill may be dismissed as against one defendant, and full relief obtained against the other. At law the same redress is given, the same judgment is entered against all. But this is the offspring of mere legal technicality, and bears no application to proceedings in a Court of Chancery; which disregarding matters of form, modifies its remedies to every variety of circumstances, and reaching the substance of the case, gives relief according to the several equities of the respective parties.

If by analogy to the course of proceeding at common law, we are to adopt the doctrine, that a bar sustained by one defendant, operates to prevent a recovery against the rest, justice surely demands that the analogy should be carried out; and that in equity as at law, an acknowledgment by one defendant should restore the remedy against all. In that event, the answer of *Fayette Gibson* in this case, would entitle the complainant to a decree against *Tilton*, as well as the other parties defendants. If in the case in *New York*, where the defence went to the whole merits of the claim, it was a matter for discordant opinions amongst eminent jurists; is there room for a doubt on the subject before us, when the defence relied on is a mere statutory bar, intended only for the protection of those who seek shelter under its wings. Upon what grounds was the plea of limitations created a bar? Upon the presumption that the party had paid and lost, or was unable to pro-

duce the evidence of his payment. *Jacob Gibson* died in less than three months after the execution of the note on which the complainant's claim is founded: and that note is made payable five months after its date. *Tilton's* plea then cannot rest on the presumption that the whole note was paid by the testator, because he died before it became due; nor on the presumption that it was paid by *Tilton*, because he was under no legal obligation to do so. All that he could have been required to pay, and therefore can be presumed to have paid, was that proportion of the debt which the value of the real estate given to his wife, bore to the value of the whole real estate devised. This is the greatest latitude that could be given to the operation of this plea of limitations. But it cannot be available even to that extent. He has pleaded for himself only; against his wife a decree *pro confesso* has been suffered to pass; so that nothing is saved by the plea but his life estate; the reversionary interest of the wife remaining liable to the claim of the complainant. Regarding the plea in this limited and almost immaterial aspect, can it be received as a bar to all redress against any of the defendants; some of whom have in answering, admitted every material allegation in the bill, and consented to a decree, giving the relief which has been prayed for? The interests of the defendants here are several and distinct, and not joint; the claim against each being in proportion to the amount devised to him. There is no joint contract to be enforced; no unity of interest in the property to be affected. If such a general rule of equity, as that stated by the Chancellor does exist, (which we cannot admit,) it should not be applied to a case like the present.

The decree under consideration can derive no support from the case of *Lingan, et al. vs. English, et ux.* decided by this court at June term, 1830. The question here agitated was not presented by the facts in that cause. The complainants filed their bill, stating that *James M. Lingan*,

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their father, conveyed by deed to *John Henderson*, a parcel of land; that *Henderson* executed and delivered a paper to *Lingan*, by which he acknowledged to have received of *Lingan*, "a deed for 420 acres of land lying in *Montgomery* county, which is to be accounted for by him; that the complainants were advised that said paper was an acknowledgment that no money was paid for said land; and that it was an engagement to pay the purchase, if there was in truth any sale to *Henderson*; or if not, to reconvey said land to him, *Lingan*." That *John Henderson* had since died intestate, leaving three of the defendants his heirs at law, and *Lydia*, (who had since intermarried with *David English*,) his widow, who administered on his estate, and "possessed herself of the personal assets of the estate sufficient to pay all just debts against it." The bill then prayed, "that by a decree of this honorable court, the administratrix of said *Henderson* may be compelled to pay the amount of the purchase money for the land aforesaid; or if the sale should not be admitted or proved, that the heirs of the said *Henderson* may be compelled to reconvey to such of your complainants as are entitled thereto, the said land," and for general relief. *English* and wife filed their answer, neither denying nor admitting assets. The bill was taken *pro confesso* as to the other defendants, except *Richard*, who pleaded the act of the General Assembly, entitled "an act for limitation of certain actions for avoiding suits at law." Upon these proceedings and the proof taken in support of them, the Chancellor decreed a sale of the land for the payment of the purchase money. The bill presented no case warranting relief, but by a decree for the reconveyance of the land by the heirs of *Henderson*; or payment of the purchase money by the administratrix. To neither of which remedies did the complainants shew themselves entitled upon the proof. The Court of Appeals therefore, could not have done otherwise than as they did, reverse the decree and dismiss the bill. It

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was not necessary to inquire into the applicability of the plea of limitations to the case presented by the bill, or into its effect and operation as pleaded.

DECREE REVERSED.

CHARLES WILSON vs. JOHN WILSON, Surviving Adm'r
of JOHN WILSON.

The allowance for commissions made to a collector under letters *ad colligendum*, granted upon a deceased person's estate, ought to have no effect upon the commissions of the executor or administrator of the same estate.

They are distinct and independent allowances for different services.

The law having fixed a *minimum* and a *maximum* rate of commission to be allowed to executors or administrators, and vested a discretion in the Orphans Court restricted only by those limits, an allowance by that court, of commissions within those rates, is not to be reviewed here.

This court has no power to disturb such a decision.

Interest is not to be charged on money retained by an administrator with the sanction of the Orphans Court and consent of parties, to meet the future contingencies of the estate.

APPEAL from the Orphans Court of *Baltimore* county.

This was a petition filed by *Charles Wilson*, on the 2nd August, 1828, as one of the distributees of *John Wilson*, late of *Baltimore* county deceased, claiming his proportion of the estate. It charged that *John Wilson* died on the 1st of January, 1819; that *Michael Tiernan* and *William Murdock* obtained letters *ad colligendum* upon the estate of the deceased, and received a large sum of money on account thereof; that on the 11th of August, 1819, *John Wilson* and *Benjamin Sterett* were appointed administrators, and had little other trouble than to receive the estate from and pass receipts to the collector, and obtain discharges from the representatives; that a much larger commission had been allowed the administrators than the services rendered by them were really worth; that is to say, $7\frac{1}{2}$ per cent. on \$55,130, which with the allowance made to the collectors as

commission, exceeds 10 per cent. for that object ; that the petitioner also was entitled to interest on \$4000 for four years, which remained in the hands of *John Wilson* the defendant ; that the defendant was about to settle another account and claim a further commission upon \$8824 74, to which he is not entitled; because the whole of that sum was taken out in hardware by the petitioner, and that *John Wilson* had no trouble whatever, except in passing a receipt for the same. *Prayer*, that the defendant may discover what trouble he had in the settlement of the estate; that the commissions may be reduced, and *Wilson* charged with the amount disallowed in his next account ; that he may settle another account, and for further relief, &c.

Copies of the accounts settled by the collector and administrators were filed with the petition, and which sustained the allegation of the amount of the commissions. The answer of *John Wilson* alleged, that by virtue of extraordinary diligence and perseverance on the part of the administrators, funds of large amount have been recovered from the collectors, and saved to the estate. That the collectors originally opposed the grant of letters, and shortly after their appointment collected \$38,600, and appropriated the same to their private and individual use by investing the same in hardware and otherwise ; that the collectors being applied to, refused or neglected to pay, and the administrators conceiving the estate in imminent peril of being lost, proceedings at law were instituted, and a decree obtained against the collectors; and finding it impossible to get the money, they were obliged to take such means as the collectors had it in their power to give ; that a large portion of the estate was received in hardware, part of which, one of the administrators sold in the western country, making himself liable to the estate therefor, and for another part they procured purchasers ; that as to the money retained by the administrators, it was done with the approbation of the court and consent of all parties, to meet the contingencies of unsettled claims and proceedings against

the debtors of the estate ; that this defendant is willing to settle the estate so soon as the petitioner shall pay the sum of \$2382 02, which he owes the estate, and has no objection that the court may diminish the commissions, if in their judgment just and equitable.

The evidence in the cause sustained the allegations of the defendant.

The *Orphans Court* decreed that the commissions allowed the administrators should not be reduced, nor the defendant charged with interest upon the sum retained by him; and that the defendant should settle a final account.

The petitioner appealed to this court.

The cause was argued before BUCHANAN, Ch. J., STEPHEN, and DORSEY, J.

By *Scott* for the appellant, and *Johnson* for the appellee.

BUCHANAN, C. J., delivered the opinion of the court.

We do not think either of the points raised in this case can be sustained.

The 14th sect. of the act of 1798, ch. 101, sub-ch. 3, authorises the issuing letters *ad colligendum* by the Orphans Courts of the several counties in the cases specified, and the 18th section authorises an allowance to a collector for his whole trouble, of a commission on the amount of the property and debts actually collected and delivered to an executor or administrator, at the discretion of the court, not exceeding three *per cent*. And the 2nd section of the 10th sub-ch. authorises the allowance to an executor or administrator of a commission at the discretion of the court, not under five nor more than ten *per cent*., on the amount of the inventory or inventories, excluding what is lost or has perished.

Here then were letters *ad colligendum* granted by the *Baltimore* county Orphans Court, and a commission of *three per cent*. allowed to the collectors, and letters of administration afterwards granted, and a commission allowed

to the administrators of $7\frac{1}{2}$ per cent. on the amount received by them from the collectors and accounted for, amounting the two commissions together to $10\frac{1}{2}$ per cent. which it is supposed exceeded the commissions that the Orphans Court was authorised to allow, by one half per cent.; on the ground that the whole amount of commissions to be allowed, cannot exceed 10 *per cent.*

But it is perfectly clear that the allowance to be made of a commission to a collector, and that to an executor or administrator, are distinct and independent allowances.

The allowance to a collector is for his trouble, &c. which has nothing to do with the trouble or duties of executor or administrator; and the allowance to an executor or administrator is for his trouble and responsibility, for which no allowance made to a collector, can be any remuneration.

It is therefore no objection, that the commission allowed in this case to the collectors, and that allowed to the administrator, amount together, to more than 10 *per cent.* The restriction is, that a collector shall not be allowed more than three, nor an executor or administrator more than 10 *per cent.*

But it is contended, that the commission of $7\frac{1}{2}$ per cent. to the administrator, is a greater allowance than ought to have been made.

The law has fixed a *minimum* of *five*, and a *maximum* rate of commission of *ten per cent.* to be allowed to executors and administrators, with a discretion vested in the Orphans Court restricted only by those limits, and the court in allowing a commission of $7\frac{1}{2}$ *per cent.* having acted within the scope of that discretion, we do not think we have any power to disturb the decision, or to review what has been done in that respect. The various circumstances determining the amount of the commission proper to be allowed, cannot appear to this court, and every case must be governed by its own peculiar circumstances, subject only to the restrictions already mentioned. But if the allowance of commission within the prescribed limits was a

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fit subject of appeal, there is nothing in the testimony accompanying the record, showing the allowance made to the administrators to be too great.

The claim to interest on the amount retained by the administrators cannot be maintained; the money was retained with the consent of all the parties concerned, under the sanction of the Orphans Court, to meet the contingency of a suit with the collectors, which appeared to be a matter not unlikely to happen before the accounts should be finally closed. The decree is affirmed with costs.

DECREE AFFIRMED.

THOMAS AYRES vs. EDWARD KAIN.—*December, 1830.*

A judgment of the County Court, upon an issue joined on a plea of *nul tiel record*, cannot be reviewed in the Appellate Court, when the appellant did not except to that judgment, and incorporate the record which was submitted to the court in a bill of exceptions, nor put any matter upon the record to shew why such judgment should not be rendered.

APPEAL from Harford County Court.

This was an action of *Debt*, brought upon an injunction bond by *Edward Kain*, (the appellee,) against *Thomas Ayres*, (the appellant.) The plaintiff, to a plea of general performance replied, shewing a final decree of the Court of Chancery dismissing the bill, to prosecute which the injunction bond declared upon, had been given. The defendant, *Ayres*, rejoined that there was no such decree; sur-rejoinder that there was such a decree and *profert* of the same. The County Court gave judgment for the plaintiff; upon which, after inquiry of damages executed, the defendant appealed.

The cause was argued before BUCHANAN, Ch. J., STEPHEN, and DORSEY, J.

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Speed, for the appellant contended, that it was the duty of the appellee to produce the record, to sustain the judgment of the County Court.

Gill, for the appellee contended, that the record referred to in the plea was used in the court below merely as evidence, and that if the defendant supposed it did not sustain the replication, he should have excepted as in other cases, where the objection arises upon the evidence in the cause; and having failed to do that, the question was not now before the court.

JUDGMENT AFFIRMED.

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The securities on an administration bond, in a suit brought by a distributee against the administrator, are not competent witnesses to prove, that the assets of the deceased have been consumed in the payment of debts.

It is not true as a uniform rule, that a creditor is a competent witness for administrators. He is only so, where the assets are sufficient for the payment of debts. When they are not, whether the administrator be plaintiff or defendant, if the verdict swells the fund to which he must look for the payment of his debts, his incompetency is manifest; he is only competent when the verdict cannot affect his interest.

The bail of the defendant is not a competent witness for him.

In an action upon an administration bond against a surety, the administrator is not a competent witness for the defendant. The witness is responsible for costs, in case of a recovery against the defendant.

An administrator, who, being called upon in Chancery to account, comes promptly into court, answers the bill, and submits all his accounts and vouchers, and furnishes the means of detecting the errors which are fairly attributable to him, is not to be presumed guilty of a fraudulent concealment of credits actually omitted.

Accounts settled in the Orphans Court, by executors, administrators and guardians, are *prima facie* evidence in all suits touching the matters therein contained, to which they are parties; and the *onus probandi* rests on him who seeks to impeach their correctness.

The Orphans Courts are the tribunals invested by law, with the power of passing claims against the estates of deceased persons.

If an executor or administrator, *bona fide*, without any knowledge of its injustice, pay a claim previously passed by the Orphans Court, though not proved in the manner prescribed by the testamentary system, such pay-

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ment is not made at his risk. To a credit therefor, he is not only *prima facie* entitled, but his right to it cannot be controverted. So if he retain the amount of his own claim thus passed.

When the accounts of an executor are under an examination in Chancery, if it should appear on the face of vouchers passed by the Orphans Court, that a claim paid, was not a just one against the deceased, it is as much the duty of a Court of Equity to reject it, as if the illegality of its allowance were established by proof *dehors*.

I, as executor of E, claimed an allowance for the payment of a note signed I and E, which was admitted by the Orphans Court; I passed his account accordingly, and was credited for the whole amount. This account being under investigation in Chancery, and it being admitted that the signature I and E, was in E's hand writing, in the absence of proof of partnership between them: HELD, that the *prima facie* character of the account was not impeached.

Where two are bound for the payment of a specific sum, and one pays the whole, he can either at law or equity, call upon the other to contribute, and thus recover a moiety of what he has paid.

APPEAL from the Court of Chancery.

The appellant, *Thomas Owens*, a minor, by his *prochein ami*, filed his bill of complaint against the appellee, *John Collinson*, on the 9th of May, 1826. The bill stated that one *Edward Collinson*, of *Anne Arundel* county, died intestate, and without issue, sometime in the year 1823, possessed of a considerable personal estate, leaving the complainant, (a sister's son) and several brothers and sisters, his next of kin, and personal representatives. That *John Collinson*, the appellee, took out letters of administration on his estate; possessed himself as such, of the assets of the deceased, and disposed of the same to an amount more than sufficient to discharge all claims against him. That a large surplus remains in the hands of the administrator, subject to distribution among the representatives of the intestate. That instead of distributing the surplus, as bound by law to do, the administrator has converted the same to his own use, and refuses to pay complainant the share to which he is entitled; alleging that the assets of the intestate have all been paid away, or retained by the administrator for debts due him from the deceased; which debts so retained for, the complainant charges to

be false, and fraudulent; and he further charges that the intestate died indebted to a very inconsiderable amount, and that if pretended debts to a very large amount, have been paid by the administrator, it has been collusively done, and for the purpose, the more easily to convert the residue to his own use. *Prayer*, that said administrator may be compelled to account with complainant, and to pay him his distributive share, of whatever balance may be found to be due, and for general relief.

The *subpoena* which was issued on the above bill, was returnable to July term, 1826.

At that term the defendant filed his answer, admitting that *Edward Collinson* died intestate in the year 1823, leaving the complainant, the son of a sister, and several brothers and sisters, and the children of brothers and sisters, his personal representatives, as alleged in the bill. That said intestate died seized, and possessed of both real and personal estate, and that defendant became his administrator. That the intestate being largely indebted to the defendant, and various other persons, he applied to, and obtained an order from the Orphans Court, for the sale of his personal estate, which was accordingly disposed of, and the proceeds applied, by the defendant, to the payment of the debts of his intestate, as will appear by copies of his accounts settled with the said court, marked exhibit (A) and the vouchers accompanying the same, numbered from 1 to 23, inclusive. That by said accounts it will appear, that the personal estate of the intestate was inadequate to the payment of his debts, and being so, the defendant alleges that application was made to the Court of Chancery for a sale of the real estate, to make up the deficiency; that a sale was accordingly decreed, and the proceeds thereof, after supplying the deficiency of the personal estate, were divided among the legal representatives of the intestate, all of whom, except the guardian of complainant, are perfectly satisfied, with the manner in which the defendant has conducted his administration.

The answer further states, that the intestate and defendant, for many years, were co-partners in all their various dealings and business, and that they continued so to be until a short time previous to the death of the intestate, when a dissolution, by mutual consent, took place, and an adjustment and settlement of their transactions and accounts was made in the presence of *William Collinson* and *Edward Harper*, two of the representatives of said intestate, upon which settlement, said intestate became indebted to the defendant in the amount, for which he has been allowed in his settlements with the Orphans Court. The answer denied all fraud, &c.

Exhibit (A) contains the accounts settled by the defendant, as administrator of *John Collinson*, with the Orphans Court; the first proved and passed on the 8th February, 1825, the latter being the final account, on the 24th of June of the same year, by which the estate appears to be overpaid the sum of \$3,958 91½ cents.

Voucher No. 13, is a note signed by *John* and *Edward Collinson*, payable to *Nathaniel Chew*, on demand, for \$228 50, dated May 22, 1812, which with interest to the date of its payment, by the administrator, on the 28th January, 1825, amounted to \$347 54. For the whole of this sum the administrator obtained a credit.

No. 16, is a note similarly signed, in favor of *William Collinson*, for \$550, dated July 14, 1814, and amounting the 7th January, 1825, when paid by the administrator, to \$896 77, for the whole of which a credit was likewise obtained.

No. 18, is an open account against *John* and *Edward Collinson*, due *Nathaniel Chew*, amounting when paid by the administrator, to \$470 38, for which also a credit was obtained.

No. 19, is an account against the deceased, due *John Collinson* the administrator, shewing a balance due the latter on the 25th March, 1823, of \$3,909 51, a credit for which was also obtained.

No. 21, is a similar account, exhibiting a balance due to the administrator of \$580 35, for which likewise a credit was obtained.

The above claims were all proved, and passed by the Orphans Court, prior to the settlement of the accounts of the administrator.

Commissions issued by consent, to *Anne Arundel* and *Baltimore* counties.

With one of those commissions the complainant filed a copy of the administration bond of the defendant, by which it appeared that *Edward C. Harper* and *William Collinson*, were his securities for the faithful performance of his trust, and under the same commission, persons of the same name were examined as witnesses on the part of the defendant.

There was evidence that the administrator had received, after the death of the intestate, dividends on bank stock, standing in his name, to the amount of \$355 50, with which he had not charged himself in his settlements with the Orphans Court; and it was further proved under the commissions, that the proceeds of a crop of tobacco sold by one *Norris*, on account of the intestate, were received by the administrator, with which in his said settlements, he had failed also to charge himself.

On the 8th of March, 1828, the auditor in obedience to the Chancellor's order for an account, stated an account between the defendant and complainant, by which, charging the defendant with the proceeds of the tobacco sold by *Norris*, the dividends on the bank stock, and the sums specified in the before mentioned vouchers, there appeared to be a considerable amount due the complainant, as his distributive share of the said intestate's estate.

Exceptions were filed by the defendant to this account, and the auditor in obedience to specific instructions given him by defendant, stated another account on the 31st May, 1828, according to which, crediting him with the disputed vouchers, and omitting to charge the proceeds of said to-

bacco and bank dividends, he is made to have overpaid the estate the sum of \$4077 80 cents.

BLAND, Chancellor, on the 2d of June, 1828, rejected both of those accounts, and directed the auditor to state another, upon certain principles prescribed in the order.

On the 3d of June, 1828, the auditor, in conformity with this order, stated a third account, by which the estate appeared to be overpaid \$3132 32. On the same day, BLAND, Chancellor, rejected this account, as not being in accordance with his order, passed the day before; but being of opinion that the defendant had distributed all the assets which came to his hands, he dismissed the bill with costs.

From this decree the complainant appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, STEPHEN, and DORSEY, J.

Alexander, for the appellant, contended,

1. That the appellant was entitled to a proportion of the dividends of the bank stock, and of the proceeds of the tobacco, which the appellee was proved to have received, and with which he is not charged. 2. That there is no evidence that appellee's vouchers, Nos. 13, 16 and 18, were legal and equitable claims against the intestate. 3. That the appellant is entitled to a proportion of the amount of vouchers, Nos. 19, 20 and 21, there being no evidence that said vouchers were just and equitable claims against the estate of the intestate; and because if said claims are proved once to have had existence, they furnish no evidence of the balance due by intestate to appellee on the settlement of all their accounts and dealings, which is charged in the answer, to have taken place between them. 4. The appellant relies on the pleadings and proofs, as evidence that the accounts passed with the Orphans Court, by the appellee as administrator, are not correct; and also to support the charge of fraud, as set forth in his bill. 5. The appel-

lant admits that he cannot recover beyond the amount of the personal assets, which came into the possession of the appellee, deducting the legal expenses of administration. He contended also that the securities in the administration bond were not competent witnesses for the appellee. On this point, he referred to *Ferguson vs. Cappeau*, 6 Harr. and Johns. 394. *Ib.* 402. 1 *Philips' Ev.* 52. *Craig vs. Cundell*, 1 *Campb.* 381. He referred also to *Ringgold vs. Ringgold*, 1 Harr. and Gill, 81. *Hart vs. Ten Eyck*, 2 Johns. Ch. C. 67. The act of 1798, ch. 101, sub-ch. 8 and 9. 1785, ch. 46. 1802, ch. 101, sec. 9. *Bean vs. Jenkins*, 1 Harr. and Johns. 135. *Morton vs. Beall*, 2 Harr. and Gill, 136. He further insisted, that the defendant's interrogatories were leading, and to show that answers to such interrogatories are not evidence, he referred to 2 *Madd. Ch. P.* 413, 442. *Morse vs. Royall*, 12 *Vesey, Jr.* 360. *Newland's Prac.* 297, 298. Objections of this description, may be made at the hearing. *Gilbert's Rep.* 150. 1 Harr. Ch. 455. 1 *Ambler*, 585. *Collins vs. Elliott*, 1 Harr. and Johns. 1. *Stevenson vs. Myers*, *Ib.* 102. 1 *Ball and Beatt.* 413.

Brewer, Jr., for the appellee.

The settlements in the Orphans Court, are at least *prima facie* evidence for the appellee. 1798, ch. 101, sub-ch. 9, sec. 13, 15. *Scott vs. Dorsey*, 1 Harr. and Johns. 231. *Spedden vs. The State*, 3 Harr. and Johns. 276. *Gist vs. Cockey and Fendall*, 7 Harr. and Johns. 134.

The competency of a witness should be objected to, at the examination; it is too late, after the return of the commission. A copy of the administration bond is not evidence to shew, that *Harper* and *Collinson* were sureties; that fact should have been proved by the subscribing witnesses. But if the fact of their being sureties was sufficiently proved, still as there is no direct interest in the result of the suit, the objection to their competency cannot be sustained. *King vs. Prosser*, 4 *Term Rep.* 17. *Scott vs. Dorsey*, 1 Harr. and Johns. 232. If the interrogatories

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are supposed to be leading, the objection should be made at the examination, as both parties are present, or notified to be present. On the subject of leading interrogatories, he referred to 1 *Ambler*, 585. *Morse vs. Royall*, 12 *Vesey, Jr.* 360. *Gilb. Rep.* 150.

DORSEY, J., delivered the opinion of the court.

The first question to which our attention is called in the consideration of this case is, are the securities in an administration bond, in a suit brought by a distributee against the administrator, competent witnesses to prove that the assets of the deceased have been consumed in the payment of his debts? Upon principle and analogy, this question is simple and easy; but when viewed in reference to decisions on the subject, it cannot be regarded as free from difficulty. In *Carter vs. Peace*, 1 *T. R.* 163, it was decided, that in an action against an administrator, one of his securities, for the due administration of the effects, is a competent witness to defeat the action. And this case is cited as establishing that principle in 2 *Stark. Ev.* 775. The grounds assigned by the court in support of their opinion, were, that “the bare possibility of an action being brought, is no objection to competency;”—“that in order to disqualify a witness, it is necessary to show that he will derive a certain benefit from the result, one way or other;”—“that even the creditor of the administrators, which is a stronger case, would be a competent witness.” With great deference to authority so imposing, it does appear, that the grounds upon which the decision of the court is placed, are not sufficient to sustain it. In the first place, it is not true as a uniform rule, or principle of law, that a creditor is a competent witness for administrators. He is only so where the assets are sufficient for the payment of debts. Where they are not, whether the administrators be plaintiffs or defendants, if the verdict swells the fund to which he must look for the payment of his debt, his incompetency is manifest. He is

only competent, therefore, where the verdict cannot affect his interest. Can it be said then, that the admission of a creditor to testify for the administrator, (under the circumstances in which only his testimony is admissible,) is a stronger case, than that of a surety in the administration bond testifying for the administrators, defendants; when it is considered that a verdict for the defendants is a discharge *pro tanto*, of his liability on his bond; and that a verdict for the plaintiff is evidence against him the witness, in a suit on his administration bond. Can it be a bare possibility that an action will be brought, that the interest is too remote, when the liability is so immediate, the interest so obvious, the benefit so certain?

The case at bar, is not one, where the recovery against the administrator, is an indispensable preliminary to the institution of a suit against the securities; but one in which their responsibility, (except in amount) is already fixed. Where they might have been sued before, or may be sued after the decree of the Chancellor, where the amount which ought to be recovered against the defendant, is identical, with that which should be recovered against them; where the decree too, may be used in evidence against them. But even admit it were the case, where a recovery against the principal is a pre-requisite to the commencement of an action against the security, as in the case of a creditor suing an administrator; upon principle and analogy, the decision should be the same. The interest is direct; as by defeating the suit, he discharges himself from all claim for its amount. His liability is immediate; as upon failure to make the money of the administrator, his bond may be put in suit. That the bail is an incompetent witness for the defendant, is a principle so universally admitted, that authorities need not be cited to prove it. In 2 *Stark. Ev.* 786, it is laid down as text law, that "where a surety would be immediately liable, in case of decision against the principal, his interest is obvious, and therefore a bail is incompetent in an action against his principal." In what respect

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is the bail's responsibility more immediate than that of a security in an administration bond, where his principal is sued by a creditor? After judgment, and a return of a *non est* to *ca. sa.* and not before, can process be had against the bail. After judgment, a return of *nulla bona* upon a *fi. fa.* and not before, can you sue the security, in an administration bond. If the verdict be for the defendant, the bail is absolutely discharged from all liability for the debt sued for—if for the defendant administrator, his security is equally so. But the bail has this obvious advantage; his liability is not absolutely fixed and certain. At any time before, or within a few days after the return of the *scire facias* against him, he may surrender his principal, and thereby is absolutely discharged. Not so with the security in an administration bond; he has no such means of self-exoneration. But the present is a much stronger case, than even that of bail or surety in an administration bond, the administrator being sued by a creditor. Here if the plaintiff had any cause of action, the liability of the surety was fixed, and certain, and his only means of exonerating himself, was by defeating the claim of the plaintiff. Is it possible he can be deemed a competent witness for that purpose? Without violating all analogies, and the best established rules of evidence upon this subject, we think the testimony of the securities in the administration now before us, cannot be received. That the views of this court have heretofore been in accordance with the present determination, we think inferable, from their opinions in the cases of *Seegar, Ex'rs vs. the State use of Betton*, 6 Harr. and Johns. 162, and *Fergusson vs. Cappeau's Adm'r*, 6 Harr. and Johns. 394.

A liability for costs of suit renders a witness incompetent. In a suit by an indorsee against an accommodation indorser, the maker of the note is not a competent witness for the indorser; because in defeating the suit, he discharges himself from the costs, for which he would be answerable, in case judgment were rendered against the indorser. Or to speak more immediately on the facts before us, if a

suit were instituted on the administration bond against the surety, the administrator is an incompetent witness for the defendant, his testimony going to exonerate himself from the payment of costs, for which he would be liable to the defendant, in case a recovery were had against him. But if the administrator were sued as in this cause, on his administration bond, for the claim now in litigation, according to the principle now contended for, the security would be a competent witness for the defendant, although by his own testimony, he absolves himself from all liability for the debt, or cause of action. If such be the law, it has neither reason nor justice to sustain it. In *Miller vs. Falconer*, 1 *Campb.* 251, an action on the case for negligence in running against plaintiff's cart, with a dray. The plaintiff's servant, who drove the cart, being called as a witness, was rejected by *Lord Ellenborough*, on the ground, "that the witness certainly comes to discharge himself." In *Morish vs. Foote*, 8 *Taunt.* 454, an action on the case for negligently driving a mail coach against the plaintiff's wagon-horse, whereby it died, the plaintiff's wagoner was rejected for incompetency, as being interested in the event of the suit, inasmuch as "he would be placed in a state of security," by a verdict against the defendant. If in these cases, the witnesses were incompetent, (without a particle of proof showing aught for which an action would lie against them) on the ground that the verdicts to be rendered would "discharge them," "or place them in a state of security;" does not the same objection apply with still stronger force, to the competency of the witnesses, in the record before us. They are interested in the event of the suit, because the decree of the Chancellor, if in favor of the defendant, absolves them from all liability; if against the defendant, it is evidence against them when sued on their bond. *Iglehart vs. State use of Mackubin*, 2 *Gill and Johns.* 235. In *Morton vs. Beall's adm'r*, 2 *Harr. and Gill*, 136, it was determined that the security in a replevin bond, is not a competent witness for the plaintiff in the action of replevin. If the point,

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there adjudged, be in principle distinguishable from that now under consideration, the shade of distinction is so feint, as to be discernible only by minds peculiarly adapted to the investigation of legal subtilities. Rejecting the testimony of the witnesses in the administration bond, the enquiry presents itself, are there any other grounds upon which the decree of the Chancellor, dismissing the appellant's bill of complaint, can be sustained? That the answer of the defendant with the accompanying exhibits, are sufficient for that purpose, we entertain no doubt. In *May*, 1826, the bill is filed, charging the fraudulent misapplication of the effects of the deceased, and conversion thereof to the defendant's own use, and praying that he may answer the allegations in the bill, and account with the complainant, &c. The defendant at the earliest moment that it could be done, appears in the Chancery Court, files his answer, denies the fraud with which he had been charged, makes a full disclosure of the manner in which he had settled the estate of the deceased, and files copies of the accounts which he had passed with the Orphans Court, and exhibits all the vouchers for which he had obtained credit; although no requisition for that purpose had been made by the complainant. This promptitude and willingness in the defendant, to submit all his proceedings to the inspection of his adversary, and of the Chancellor, strongly repels the imputation of fraud, and entitles him to the favorable consideration of a Court of Equity. Nor do we think, under the circumstances of this case, the proof that he has, in his settlements with the Orphans Court, omitted to charge himself with \$355 50, received as dividends on bank stock, and \$471, the proceeds of a crop of tobacco from *Thomas Norris*, of *Baltimore*, and his charging in this account No. 19, the whole, instead of the one half of \$385, the difference in value between the lots of negroes divided, such conclusive evidence of wilful misconduct on the part of the defendant, as to divest him of all claim to the favor and protection of a Court of Chancery, and so to taint with perjury and

fraud, his accounts and vouchers from the Orphans Court, as utterly to discredit them. The charge of \$385, manifestly originated in mistake, as appears by the endorsement on the voucher, on which it is founded, and is an error into which he might very innocently have fallen. The failure to debit himself with the tobacco money received of *Thomas Norris*, appears also to have proceeded from carelessness or forgetfulness, as if fraud had been designed, he furnished the means of its detection, by charging in his account No. 21, against *Edward Collinson's* estate \$238 07, the one half of \$477 34, the net proceeds of the tobacco, excluding the articles paid for by *Norris*, for *Edward Collinson*. Candor compels us to regard his omitting from his accounts, the \$355 50 of bank dividends, as an unintentional act. In accounting as he did for the bank stock, those interested in the estate, were naturally led to an inquiry as to payment of dividends. That a fraudulent concealment was intended, is therefore not to be presumed.

In argument for the appellant, it has been contended, that the proceedings in the Orphans Courts, are not evidence of any thing for the appellee, and that he is bound to prove in this case, not only the actual payment of every claim for which he has received credit, but that such claims were justly due and owing from the intestate. After the solemn decisions made in this State, and reported in *Scott, et ux. vs. Dorsey's Ex'rs*, 1 *Harr. and Johns*. 227. *Spedden vs. The State use of Marshall, and ux.* 3 *Harr. and Johns*. 251. *Gist's adm'r d. b. n. vs. Cockey and Fendall*, 7 *Harr. and Johns*. 134, the doctrine insisted on, is no longer a subject for discussion in our courts. If any principle has been conclusively settled by our decisions, it is, that the accounts settled in the Orphans Courts by executors, administrators, and guardians, are *prima facie* evidence, in all suits touching the matters therein contained, to which such executors, administrators or guardians, are parties; and that the *onus probandi*, rests on him, who seeks to impeach their correctness. The great controversy

relative to such accounts, heretofore has been, not whether they were evidence at all, but whether they were not *conclusive* evidence.

The appellant's counsel next urged that the "vouchers," on which the credits in the Orphans Court were allowed, being produced, and it appearing upon the face of them, that though passed by the Orphans Court, previous to their payment, they were not proved in the manner required by our testamentary system, as a pre-requisite to their passage; that the defendant paid them in his own wrong, and is entitled to no allowance therefor. The inconsistency and injustice of such a position is so glaring, that it is scarcely necessary to say it is wholly untenable. The Orphans Courts are the tribunals invested by law, with the power of passing claims against the estates of deceased persons, and the act of assembly of 1798, *ch. 101, sub-ch. 8, sec. 22*, declares, "that no executor or administrator, shall discharge any claim against the deceased, (otherwise than at his own risk,) unless the same shall be passed by the Orphans Court, granting the administration, or unless the said claim be proved according to the following rules." The irresistible inference is, that if an executor or administrator, *bona fide*, without any knowledge of its injustice, pay a claim, thus passed or proved, that the payment is not made at his risk. To a credit for such a payment, under such circumstances, he is not only *prima facie* entitled, but his right to it, cannot be controverted. It has also been insisted, that admitting the settlements made with the Orphans Court, are *prima facie* evidence, to sustain the credits for all payments made, in satisfaction of debts due third persons, yet they are no evidence to support an allowance made to the administrator for his own claim. This court can see nothing to warrant such a discrimination. In the act of 1798, *ch. 101, sub-ch. 8, sec. 19*, it is stated, "that in no case shall an executor or administrator, be allowed to retain for his own claim against the deceased, unless the same be passed by the Orphans Court, and every such

claim shall stand on equal footing with other claims of the same nature.” As full power is delegated to the Orphans Court, to allow an account of an executor or administrator, against the deceased, as if a like claim had been preferred by any other person. The claims of an administrator in this case, in common with all other claims against the deceased, being accredited to him in the settlement of his accounts with the Orphans Courts, such accounts must be regarded by us, as the acts of a court of competent jurisdiction, but whose proceedings being wholly *ex-parte*, are not conclusive, but rest on the principle that, “*omnia rite acta fuisse presumuntur, donec probitur in contrarium.*” With the vouchers all before him, the appellant has not attempted to offer any testimony, (although several commissions were issued, giving him that opportunity) to impeach or discredit any of them; but founds his objections, exclusively on suggestions arising on their inspection. This is a strong circumstance to repel the allegation of fraud, which has been urged against the appellee. He was guilty of no concealments with regard to the credits which have been allowed him, but furnished the Orphans Court with the same grounds for suspecting and rejecting his vouchers, which he so promptly afforded the appellant. It cannot be denied, that if it appear on the face of a voucher, that it is not a just claim against the deceased; it is as much the duty of a court of equity to reject it, as if the illegality of its allowance were established by proof *dehors*. Looking to vouchers Nos. 13 and 16, independently of any proof in the cause, or admission of the counsel on record, it must be admitted that the Orphans Court erred, in allowing the administrators credits for their whole amount; because they show debts due by *Edward* and *John Collinson*, and not by *Edward* alone. But it cannot be denied, that if the whole of those claims were paid by *John*, after *Edward's* death, that the Orphans Court would be justified in crediting *John* with a moiety of the amounts paid by him, upon the ground that *Edward* and *John*, being both principal debt-

ors, if one pay the whole, he can either at law or in equity, call upon the other to contribute, and thus recover a moiety of what he had paid; but connecting the admission made by the appellant's counsel, that the signatures to the notes, are in the hand-writing of *Edward Collinson*, the Court of Chancery were right in crediting the administrator with the whole payment made on those notes, it not appearing that *Edward Collinson* had any authority to sign the name of *John*; he is the debtor, being alone answerable for the payment of the notes. In thus considering the case, we put out of view all the testimony taken by the appellee to sustain his vouchers, upon the objections to its admissibility raised by the appellant, on the ground that the whole of it must be suppressed, as being given in answer to leading interrogatories, and that *William Collinson* and *Edward C. Harper*, being securities in the administration bond, are incompetent witnesses. But it is insisted on in behalf of the appellants, that these claims, and also No. 18, were debts due by *Edward* and *John Collinson*, under a general partnership, subsisting between them, and that *John* is not entitled to claim a moiety of any particular partnership debt, he may pay; but his claim, if any, must be for the balance due on a final settlement between the partners of the partnership concerns, or upon a full exhibition of all their company transactions, and thus ascertaining the general balance, to the payment whereof he is entitled. Upon what does the appellant rely for establishing the fact, that a general partnership existed between *Edward* and *John Collinson*. He has offered no evidence for that purpose, and he can insist on it only in two ways. *First*, that it is proved by the testimony taken by the defendant in support of his defence, or that the defendant had stated it in his answer, (though in a part not responsive to the bill.) If he relies upon the proof to which he has objected, he waives his objection to its competency; his whole equity is disproved, and he has nothing in the record to give him a moment's standing before this court. If he relies upon the defendant's answer,

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his predicament is equally deplorable. The whole equity of the bill is sworn away, and he has nothing to sustain it, which could produce any possible change in the decree of the Chancellor. Upon whatever grounds, therefore, the appellant may choose to rest his case, the vouchers Nos. 13 and 16 are sustained; but if he repudiates the answer and suppresses the appellee's testimony, taken under the commissions, he is entitled to claim a deduction of one-half from voucher No. 18, amounting to \$235 19, which being added to the one-half of \$385, and the amount of bank dividends, and the price of the crop of tobacco of 1823, received by *John Collinson*, will make the sum of \$1260 53, which amount is properly chargeable against the administrator, and being deducted from \$4077 80, the amount of the estate over paid, as per auditor's statement of the 31st May, 1828, will leave the estate overpaid by the sum of \$2817 27. As to objection to vouchers Nos. 13 and 18, that the receipts thereon were signed by *Nathaniel Chew* of *John*, for *Nathaniel Chew* of *Joseph*, and that the appellee has adduced no proof to show an authority in the former to act for the latter, we have only to observe, that by allowing credits for these claims, the Orphans Court have recognized the validity of those receipts, which recognition has been supported by the oath of the administrator, that he has paid the creditor; and that fortified too, by the possession and production of the note, and account, with the receipts thereon. Under such circumstances, and in the absence of all proof on the subject on the part of the appellant, we are not bound, and certainly feel no disposition to doubt the authority of the agent.

DECREE AFFIRMED.

Finley vs. Boehme.—1830.

EBENEZER L. FINLEY vs. CHARLES L. BOEHME.*December, 1830.*

F, intending to build on his farm at C, and have the bricks made there, agreed with B under seal as follows: that is, "B contracts to make for the said F 300 m bricks on said farm, in the following proportions: not less than one-fifth salmon; two-fifths red; two-fifths black. The first kiln to be ready for delivery in the month of May next. In consideration of which, F contracts with B to furnish free of expense, all the scantling and plank necessary for making the bricks; and pay B \$5,50 for every thousand of good merchantable bricks in the following manner: one-half of said amount of bricks to be paid for in pine wood, delivered at the stump, when called for, on said farm, at \$2 50 per cord; \$300 to be paid when the first 100 m are delivered; \$300 when the second 100 m are delivered; and the balance when the contract is completed." HELD, upon the construction of this contract, that the engagement for the delivery of the wood, was an independent covenant on the part of F, with which he was bound to comply, without waiting for the burning of the first kiln of bricks.

In an action upon a contract under seal, where the declaration assigns and relies upon specific breaches, on which the issues are made up, the court will not consider whether the plaintiff has delivered the articles for which he claims compensation within the time limited by the contract, if that inquiry is not necessarily involved in the issues as joined, nor determine the effect of such an omission upon the rights of the parties.

The plea of general performance, when relied on as an answer to a specific breach assigned in a declaration in covenant, must either be regarded as a nullity or as putting in issue the acts of commission or omission imputed to the defendant as violations of his contract.

APPEAL from Baltimore County Court.

This was an action of covenant brought by *C. L. Boehme*, the appellee, against *E. L. Finley*, the appellant. The plaintiff's declaration stated that "whereas by certain articles of agreement made the 17th February, 1820, at &c. between the said plaintiff and defendant, (which said articles, sealed, &c.) the plaintiff, for the considerations therein mentioned, did covenant with the defendant, to make and burn for him, the defendant, on a certain farm of the defendant, called *Canton*, lying and being in the county aforesaid, 300m bricks in a workman-like manner, and of the following proportions:—not less than one-fifth to be of

salmon bricks, two-fifths of red bricks, and two-fifths of black brick—the first kiln of bricks to be ready for delivery in the month of May next, ensuing, the day and year aforesaid—the number of bricks to be ascertained by the carters' tickets, to be given up on the delivery of each load. And the defendant, on his part, for and in consideration of the premises, covenanted and agreed to and with the plaintiff, that he, the defendant, would furnish free of expense to the plaintiff, all the scantling and planks necessary for making the said bricks; and would pay the plaintiff, five dollars and a half for every thousand of good merchantable bricks, made in the manner described in the said articles of agreement—one-half of said bricks to be paid for in pine wood, delivered at the stump when called for, on said farm, at two dollars and fifty cents per cord—three hundred dollars to be paid to the said plaintiff when the first hundred thousand bricks should be delivered—three hundred dollars when the second hundred thousand bricks should be delivered—and the balance to be paid when the said contract should be completed.” *1st breach*, And the plaintiff in fact saith, that afterwards, viz. on the 10th day of May, in the year aforesaid, at &c. he did make and burn, in a workman-like manner, on the farm of the defendant, called *Canton*, one kiln of bricks containing 100m bricks; and then and there had the same ready for delivery to the defendant, and did then and there offer to deliver the same to the defendant. *2nd breach*, And the plaintiff in fact further saith, that on the day and year last aforesaid, at &c. he the plaintiff, did make 120m bricks, and was then and there ready and prepared to burn the same, but was, by the said defendant, hindered, prevented, and forbidden from burning the same, and from making and burning the residue of the said 300m bricks. *3d breach*, And the plaintiff in fact saith, that although he hath always, from the time of making the said articles of agreement, well and truly performed all things therein contained, on &c. yet protesting that the said defendant hath not, &c. the said plaintiff avers,

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that although he did, on the tenth day of May, in the year aforesaid, make and burn in a workman-like manner, 100m bricks, on the farm of the defendant, called *Canton*; and then and there had the same ready for delivery, and offered to deliver the same to the said defendant; yet the said defendant did not, and would not pay, and as yet hath not paid to the said plaintiff, the sum of three hundred dollars; and although the said defendant, on the day and year last aforesaid, at, &c. and on the farm aforesaid, did make 120m bricks, and was then and there ready and prepared to burn the same; yet the defendant hindered, prevented, and forbid the plaintiff to burn the same, or to make and burn the residue of the said 300m bricks; and although afterwards, viz: on, &c. at, &c. the plaintiff did demand of the defendant, and require him to deliver to the plaintiff, on the farm aforesaid, 350 cords of pine wood at the stump; yet the defendant wholly neglected and refused to deliver the same to the plaintiff, and still refuses. And so the said plaintiff saith, that the said defendant hath not, &c.

To this declaration the defendant pleaded, 1st, general performance.

2nd. That the said plaintiff never did deliver to the said defendant, any good merchantable bricks whatever, and of this, &c.

3d. And for further plea to the *first* count or breach in the declaration contained, the said defendant, by leave, &c. says that the plaintiff ought not, &c. by reason of any thing in the said *first* breach of the declaration contained; because he says, that, protesting, &c.; yet the said defendant in fact saith, that the said defendant did not hinder, prevent, or forbid, the said plaintiff from burning the 120m bricks, or from making and burning the residue of the 300m bricks in the declaration mentioned; and of this he puts himself upon the country.

4th. And for further plea to the *second* breach or count in the declaration, the said defendant, by leave, &c.—the said defendant, protesting as in the last plea, says that the

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plaintiff, for any thing in the said *second* count or breach contained, ought not, &c. because he saith that he, the said defendant, did pay to the said plaintiff the sum of three hundred dollars, in the said *second* count or breach mentioned, and all other sums of money which, by the said agreement he ought to pay him; and of this he puts himself upon the country, &c.

Upon these pleas issues were joined.

At the trial of the cause the following exceptions were taken:—1st. The plaintiff gave in evidence the following contract, to wit: “Agreement between *Charles L. Boehme* and *E. L. Finley*. *E. L. Finley*, intending to build a dwelling house and other houses, on his farm at *Canton*, and to have all the bricks for such houses made on the farm; and *Charles L. Boehme* being desirous of contracting for the making of said bricks, the said *Charles L. Boehme* and *E. L. Finley*, have mutually contracted with each other, and by these presents do hereby contract with each other, in the following manner—that is to say: *Charles L. Boehme*, contracts to make for the said *Ebenezer L. Finley*, 300m bricks, on said farm; the bricks to be made and burnt in a workman-like manner, and in the following proportions:—not less than one-fifth to be of salmon bricks, two-fifths of red bricks, and two-fifths to be of black bricks. The first kiln of bricks to be ready for delivery in the month of May next—the number of bricks to be ascertained by the carters’ tickets, which are to be given on the delivery of each load—in consideration of which *E. L. Finley* contracts with the said *Charles L. Boehme*, to furnish, free of expense, to said *Boehme*, all the scantling and plank necessary for making the said bricks, and to pay the said *Charles L. Boehme* five dollars and a half for every thousand of good merchantable bricks, made in the manner heretofore described; in the following manner:—one-half of said amount of bricks to be paid for in pine wood, delivered at the stump when called for, on said farm, at two dollars and fifty cents per cord—three hundred dollars to

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be paid to the said *Charles L. Boehme*, when the first 100m bricks are delivered—three hundred dollars to be paid when the second 100m bricks are delivered—and the balance to be paid when the contract is completed. As witness our respective hands and seals, this seventeenth day of February, 1820.”

And then proved by *Charles Brown*, a competent witness, that he examined the bricks manufactured by the plaintiff, for the defendant, at *Canton* farm: that there was a clamp of bricks burnt—he recommended *Boehme* to take off nine inches from the clamp, which *Boehme* did—79,300 remained; there was six cords of wood remaining, and casing sufficient for all the raw bricks—then 120,000 bricks in the shed, as nearly as they could ascertain—the 79,300 bricks were burnt as well as the clay would admit, the clay was weak, the bricks were merchantable—the unmerchantable bricks taken down, were seven or eight thousand. That *Finley* refused to deliver the wood to burn the other bricks with, unless paid for in cash—that the bricks under the shed were well prepared for burning, and were not burnt for want of wood. The conversation with *Finley* was on the 3d day of November. That the bricks would have worked up well on the ground, but would not bear transportation—merchantable bricks were from \$5.50 to \$6—would have made no difference in price by selling 300,000. *Finley* told *Boehme* that he had not complied with his contract—that he, *Finley*, was in advance, and would furnish no more wood unless paid for in cash—half a cord of wood requisite to burn 1000 bricks. And also proved by *James Shields*, that the witness is a brickmaker—selected the clay himself—commenced where he found the best clay, convenient to water—dug clay for 300,000 bricks—was detained three or four weeks for want of plank—the clay was all dug and the floors ready—applied to the carpenter for plank—never saw *Finley* at the brick yard, although he staid there constantly, the carpenter furnished the plank—he applied to *Finley* at his office—in two or three days the plank came—

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he moulded about 200,000 bricks—Mr. *Boehme* would not have more moulded—after they stopped, *Boehme* and witness called on *Finley*—*Finley* refused to deliver wood unless for cash—clay was selected with care—there is none better there—and more bricks have been since made out of it—the bricks were well burned, well moulded, and well tempered—115,000 to 120,000 in the clamp—shed would hold 160,000 to 170,000—never saw *Finley* at the yard—when he applied to *Finley* for plank, *Finley* said he thought he had it, and in two or three days the plank came—they were afterwards delayed six or seven days from burning for want of plank—he never applied to *Finley* for plank, for the clamp—*Boehme* was there once or twice a week—there was wood enough cut upon the place, in the same field, to have burnt another clamp. The plaintiff also offered evidence to the jury, that he delivered 4100 bricks to defendant, which were received by defendant. The defendant to support the issue on his part, gave evidence of the following payments, to wit:

Cash payments made C. L. Boehme.

1820, May 9,	Cash paid him	-	-	\$100 00
“ May 11,	Cash paid him	-	-	200 00
“ June 17,	Cash paid him	-	-	250 00

And of the delivery of 43½ cords of wood, at \$2.50 per cord. The defendant then moved the court to direct the jury, that if they believed that the defendant *Finley*, was in advance in money to the plaintiff upon the contract, he was not bound to deliver the wood demanded, until paid for—which direction the court [ARCHER, C. J., HANSON, and KELL, J.] refused to give; but instructed the jury, that the defendant under the contract was bound to deliver any wood demanded, which might be necessary for the burning of the bricks, in the progress of the contract—the defendant excepting.

2d Exception. The plaintiff and defendant, having given the evidence as stated in the defendant's first exception, the defendant prayed the court to direct the jury. 1st. That

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the plaintiff is not entitled in this case, to recover any other damages than the excess between the price of so much fire wood delivered at *Canton* farm, as would have been necessary to burn so much of the 300,000 bricks, as were not burnt by plaintiff; and the price at which said wood was by the contract in this case, to have been furnished by defendant. 2d. That the plaintiff is not entitled to recover, unless the jury shall find from the evidence, that the first clamp of bricks was ready for delivery by the time stipulated in the contract, provided they find that the delay was not caused by the defendant; or that if entitled to recover at all, nothing on account of the bricks burnt in said first clamp, which directions and each of them, the court refused to give. Defendant again excepting, and the verdict and judgment being for the plaintiff, he appealed to this court.

The cause was argued before BUCHANAN, C. J., STEPHEN and DORSEY, J.

Johnson, for the appellant, abandoned the first exception, and contended for a reversal of the judgment upon the second exception. 1st. Because to entitle the plaintiff to recover at all in this form of action, it was necessary for him both to aver and prove that the first kiln of bricks, mentioned in the agreement given upon, was ready for delivery in May, 1821, the time stipulated for that purpose in the agreement. 2d. That if he was entitled to recover upon other parts of the agreement in relation to the remainder of the bricks, he was not authorised to recover for this first kiln. He cited, 1 *Saund. Rep.* 320. [*m* 4.] 10 *Johns. Rep.* 213. 7 *Pick.* 181. 8 *Ib.* 178. 6 *Harr. and John.* 38. *Saund. P. and C.* 121.

Scott, for the appellee, cited, 1 *Wheat. Sel.* 383. 2 *Hen. Black.* 389. 10 *Johns. Rep.* 203.

DORSEY, J., delivered the opinion of the court.

After adverting to the state of the pleadings, he said that at the trial of this cause, two bills of exceptions were taken by

the defendant, the first of which he has abandoned in this court, as also the first prayer in his second bill of exceptions.

The first branch of the second prayer in the second bill of exceptions is, "that the plaintiff is not entitled to recover, unless the jury shall find from the evidence, that the first clasp of bricks was ready for delivery by the time stipulated in the contract, provided they find that the delay was not caused by the defendant." This instruction is predicated upon the concession, that the testimony offered was sufficient to warrant the jury, but for this objection as to time, in finding for the plaintiff on all the issues. To test the correctness of the court below, in refusing this direction, the only inquiry to be made is, does the agreement between the parties make this stipulation, as to the time, within which, the first hundred thousand bricks were to be ready for delivery, a condition precedent, the performance of which by the plaintiff, must precede his right to require the defendant to comply with any of the covenants, the infraction of which is made the basis of this action? That such is not the construction given to this contract by the appellant's counsel is obvious, or he would not have made the prayer he did, in the first bill of exceptions; nor the first part of the prayer in the second bill of exceptions; both of which are founded on the admission, that the defendant's engagement to deliver the wood is an independent covenant, not at all depending on the time of the burning of the first kiln of bricks. That it was the design of the contracting parties that a portion of the 350 cords of wood should be used in burning the bricks, will not be denied. If so, a part of it must of necessity be delivered before the burning of any bricks. But there is nothing in the contract itself, nor in the intention of the parties to be collected from it, to show that the wood was to be delivered in parcels, as the burning of the bricks progressed. If so, the agreement would have been shaped accordingly, and not have provided, as it has done, that it should be delivered at the stump "*when called*

for." Its terms negative such an interpretation. The wood was to be given as a payment of half the price of the whole quantity of bricks to be burnt, and not merely to be used in burning them: as for that purpose, 150, instead of 350 cords, would have been sufficient. We regard therefore, this engagement for the delivery of wood, as an independent covenant on the part of *Finley*, and with which, he was bound to comply, without waiting for the burning of the first kiln of bricks within the time limited by the articles of agreement. This disposes of the *first* branch of the *second* prayer, in the *second* exception. But the *second* part of that prayer presents a different question. It concedes the plaintiff has a right to recover, but it invokes an instruction of the court to the jury, that nothing is recoverable on account of the bricks burnt in the first clamp. If this point could arise under the pleadings in this cause, it would distinctly present the question, whether the stipulation as to time, is to be regarded as of the essence of the contract, and in the nature of a condition precedent; or as a mutual or independent covenant. Believing as we do, that we are not imperiously required to decide this question as to time, under the issues in the case before us, we mean to express no opinion upon that subject; and we are the more inclined to do so, from the consideration that this point has not been fully argued, and that it will come before us in a much more important suit, now upon our docket. Under the issues joined on the 2d, 3d and 4th pleas, it is manifest as regards time, that no question could arise, as those pleas by legal implication admit the truth of all the facts stated in the declaration (of which the time, &c. is one,) except those, which they specifically deny.

It is under the issue joined then, on the plea of general performance, that the appellant must avail himself, if at all, of the violation of the stipulation as to time. And in considering his right to do so, it may not be amiss to premise, that the plaintiff can recover damages for no other breaches than those charged in the declaration, as the specification thereof

is an implied admission, that the defendant, in all other respects, has complied with his contract. It follows, as a corollary, that the plea of general performance in this case, applies only to those covenants which are alleged to have been broken. If it were otherwise, and according to its literal import, the plea of general performance put in issue every covenant on the part of defendant to be performed, it might produce this strange absurdity, that the plaintiff would recover damages for breaches of covenants, whereof he had never complained; but on the contrary, the performance of which by legal intendment, he had admitted by his declaration. To any imaginable declaration which could be framed on the articles of agreement, that form the ground work of the present action, the plea of general performance is inapplicable and vicious. If it be pleaded, even to a debt on a bond conditioned for the performance of covenants, and issue be taken thereon, a verdict on such issue forms no basis on which a judgment can be entered, but a repleader must be awarded. To a declaration like that before us, assigning specific breaches, it must either be regarded as a nullity, or as putting in issue, the acts of omission or commission imputed to the defendant, as violations of his compact. In either aspect, the court below were right in refusing the instruction. The plaintiff avers in conformity to the agreement, that in the month of May, "he did make and burn in a workman-like manner, on the said farm of the said defendant, called *Canton*, one kiln of bricks, containing 100m bricks, and then and there had the same ready for delivery to the defendant, and did then and there offer to deliver the same." Instead of traversing this fact as he ought to have done, if he intended to rely upon its falsehood as a bar to a recovery, either in whole or in part, the defendant pleads "that the said plaintiff never did deliver to the said defendant, any good merchantable brick whatever;" thus, by legal intendment distinctly admitting the allegation, that the first kiln of bricks was burnt and ready for delivery at the time stipulated. This fact there-

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fore, the plaintiff need not prove, and the defendant is precluded from controverting it on the trial. The County Court then, could not do otherwise than refuse the direction to the jury which they were called upon to give. Concurring with them in their opinions in both bills of exceptions, we affirm their judgment.

JUDGMENT AFFIRMED.

THOMAS SIBLEY vs. DOROTHY WILLIAMS, EX'R OF WALTER WILLIAMS.—*December, 1830.*

An action may be maintained by a creditor of a testator, against the executor of his executor, suggesting a *devastavit* by the first executor of the goods of his testator.

The statute, 30 *Chas. 2, ch. 7*, and a part of 4 and 5, *Will. and Mary, ch. 24*, are in force in this State. They concerned the administration of justice, and it has always been understood, that the judges under the old government, laid it down as a general rule, that all statutes for the administration of justice, whether made before or after the provincial charter, so far as they were applicable, should be adopted.

Under the act of 1798, *ch. 101, sub-ch. 14, sec. 2*, it is clear that the Legislature did not mean to make any thing, the subject of administration in the hands of the adm'r, *d. b. n.* which did not exist in specie. The act of 1820, *ch. 174, sec. 3*, extended such an administration, to bonds, notes, accounts and evidences of debt, which a deceased executor or administrator may have taken, received, or had in that character, and to money in his hands, and gives power to the adm'r *d. b. n.* to recover the same by an action on the bond.

APPEAL from *Montgomery County Court.*

This was an action of *Debt*, instituted on the 3d July, 1827, by the appellant, against the appellee. The declaration was as follows :

Dorothy Williams, late of, &c. executor of the last will and testament of *Walter Williams*, late of the said county, deceased, which said *Walter Williams* was in his life-time, the executor of the last will and testament of *Leonard Wil-*

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liams, late of said county deceased, was summoned to answer unto *Thomas Sibley*, in a plea that she render unto him the sum of fifty-three dollars and a half, current money, which from him she unjustly detained, &c. and whereupon the said *Thomas*, &c. says, that whereas the said *Leonard Williams* in his life-time, to wit, on the 16th October, 1818, at the county aforesaid, by his certain writing obligatory, commonly called a single bill, (now here to the court shewn, the date of which is the day and year aforesaid,) twelve months after the date thereof, promised to pay, or cause to be paid unto *Ann Williams*, who hath since intermarried with the said *Thomas Sibley*, by which said marriage, the right to sue for and recover the said debt, hath devolved upon the said *Thomas*, the sum of fifty-three dollars and a half, current money, with interest from the date thereof. Nevertheless, the said *Leonard Williams* in his life-time, and the said *Walter Williams* in his life-time, after the death of the said *Leonard Williams*, and the said *Dorothy Williams*, since the death of the said *Walter Williams*, although often thereunto requested by the said *Ann Williams*, whilst she was sole, and by the said *Thomas*, since his intermarriage aforesaid, the said sum of money, or any part thereof, have not, nor hath either of them been rendered or paid to the said *Ann*, whilst she was sole, or to the said *Thomas* since his intermarriage aforesaid, but the same, &c. wherefore the said *Thomas* says, he is injured, &c. and the said *Thomas* further saith, that the said *Walter Williams*, as executor of the said *Leonard Williams* as aforesaid, received in his life-time, and took possession of the assets, goods, chattels, rights and credits which were of the said *Leonard Williams* at the time of his death, of great value, to wit, of the value of \$5000, and wasted, destroyed, and converted the same to his own use in his life-time, to wit, &c.

To this declaration, the defendant demurred generally, and the plaintiff having joined in demurrer, the County Court, (KILGOUR AND WILKINSON, A. J.) gave judgment for the defendant. The plaintiff appealed to this court.

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The cause was submitted on notes, to BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

Z. Magruder, on the part of the appellant, contended,

1. That where assets in the hands of an executor or administrator are converted into money or wasted, it is not necessary for the creditor to obtain letters of administration *d. b. n.*, but he may recover against his executor or administrator the assets so converted, or his proportionable part thereof. 2. That it does not appear but that *Walter Williams* was an executor *de son tort*, in which case the plaintiff might have no other redress, and the court below was bound to give judgment for the plaintiff, if any case could by possibility have happened, that might, if *true*, have enabled the plaintiff to recover immediately of the defendant.

At the common law, the executor of an executor was placed in the same situation with the original executor himself, and was bound to administer the estate of the testator, and was subject to all the responsibilities of the original executor. *Toll. Law of Ex'r*, 44. He could collect the debts due the testator, and lawfully dispose of his property; and his rights and liabilities continued to his executor in the same way, so long as the line of executors remained unbroken by intestacy. If however, the executor died and left no will, and the assets were not fully administered, it was necessary to have letters *d. b. n. cum. test. annexo*, and such administrator was entitled to all the goods, &c. which remained in specie. 3 *Bac. Ab.* 19. *Tit. Ex'r and Adm'r*. If however, the property had been wasted or converted, the administrator *d. b. n.* had no remedy at law. The unlawful act of the executor being considered one of those injuries, the remedy for which, died with the person. 3 *Bac. Ab.* 99. The creditors, however, might proceed in equity to follow the fund so wasted. (*Ib. in notis.*) "It was, however, found inconvenient that creditors, upon the death of an executor *de son tort*, or one who had made an alteration in the goods of the testator, should be without remedy at law, and

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therefore by *Stat. 30 Car. 2 C. 7*, creditors were allowed to recover their debts of executors, or administrators of executors *de son tort*, and 4 and 5, *William and Mary, ch. 24*, extended the same remedy, so as to include executors or administrators of right, where there had been a *devastavit* of the testator or intestate." 3 *Bac. Ab.* 99. It will be seen upon reference to *Kilty's* report upon the British Statutes, that both these statutes had been in use and practised under, previous to the adoption of the constitution; though he considers them as unnecessary to be incorporated with our laws, because superseded by the act of 1798, *ch. 101, sub-ch. 8, sec. 5*, which renders executors, &c. liable to be sued in any action that could have been maintained against the deceased, with some exceptions. Assuming the proposition that these statutes have been used and practised under in *Maryland*, previous to the adoption of the constitution, they must be now in force, unless repealed by some statute of this State. (*Bill of rights*.) If the acts of assembly made since, are examined, it will be seen that neither of them is inconsistent with or repugnant to them; on the contrary, some of them seem to have had these very statutes in contemplation. It is said that the act of 1798, *ch. 101, sub-ch. 5, sec. 6*, makes it necessary that an administrator *d. b. n.* should be appointed; and because it is there said "that in no case shall an executor of an executor, be entitled as such to administration *d. b. n.*" if it is supposed, the statutes aforesaid are repealed, as the beginning and concluding sections of the act of 1798 repeals all laws inconsistent with, or repugnant thereto. But this hypothesis must be incorrect; because, 1st. The words "administration *d. b. n.*" in that section, relate manifestly to such goods, &c. as remained in specie and unadministered, and not to such as have been converted, wasted or destroyed. 2d. In the same law, (1798, *ch. 101, sub-ch. 14, sec. 2*,) the authority of an administrator *d. b. n.* is expressly limited and confined to things, not converted into money, and not distributed, delivered or retained by the first administrator. 3d. The administrator in the

same act, *sub-ch.* 8, *sec.* 10, in certain cases is allowed to retain money.

As the administrator *d. b. n.* could not, under the act of 1798, get possession of property converted by the first administrator, or its value, the creditor would have been without remedy after a conversion, except in equity, unless the statute 4 and 5, *William and Mary, ch.* 24, was suffered to remain; and certainly it is not to be presumed, unless some express enactment can be shewn to that effect, that the legislature intended to take away or narrow down any remedy, that creditors, before that time, had against those who wrongfully wasted or converted the goods of deceased persons. Both these statutes are upon the same footing, and there is no reason to suppose the one repealed more than the other. Suppose them repealed, and what becomes of the remedy of the creditor against an executor *de son tort*, who has obtained property under a fraudulent bill of sale? Such an instrument is binding upon the administrator of the vendor, and if the vendee disposes of the property, or consumes it, or dies, the creditor is without remedy, unless he can pursue the executor or administrator immediately. Upon the whole then, it seems clear that the act of 1798, *ch.* 101, did not alter the liability of an executor or administrator, who had converted the property of his testator or intestate, and that it did not in any manner repeal the statute 30 *Car.* 2 *C.* 7, or 4 and 5, *William and Mary, ch.* 24. The act of 1798, *ch.* 101, did make some change in the duties of executors and administrators, as to the marshaling of the assets. For he is there directed to make a rateable distribution of the assets among the creditors of the same grade—*sub-ch.* 8, *sec.* 10, directs how this is to be done, and *sub-ch.* 8 *sec.* 16, directs the publication of the time of distribution. Should the executor or administrator receive money, and instead of distributing it among creditors, use it himself, he renders himself liable to the creditors for their respective proportions of the money so used. The act of 1802, *ch.* 101, *sec.* 1, directed that the propor-

tion of assets should be assessed by a jury. The 6th and 7th sections of the same act contain a provision directing a *sci. fa.* against an administrator whose letters are revoked, where there was a *devastavit*, and then nothing seems more clear than that the *sci. fa.* might also be directed to his executor or administrator in case of his death. This provision has never been repealed. The act of 1820, *chap.* 174, *sec.* 3, 4, 5, 6, provides a mode by which an administrator *d. b. n.* may be put in possession of the fund left by the first administrator, but does not pretend to take away any liability of the executor or administrator of the deceased. If the fund does pass into the hands of the administrator *d. b. n.* it would be a defence to the action—So it would be a defence by an executor *de son tort*, that he had delivered the property in controversy, to the true executor before action brought—The general reasoning of the court in *The State vs. Blackiston*, 2 *Harr. and Gill*, 139, favors this position.

It does not appear but that the testamentary bond of *Walter Williams* is dated before the passage of the act of 1820. It seems to me questionable, whether an administrator *d. b. n.* could recover on such a bond for a breach, not within the terms of the condition, because it alters the nature of it, and the act of 1820, *ch.* 174, would not be allowed so to operate. Previous to that act, no suit could be maintained on it by an administrator *d. b. n.* for goods converted. It is evident that an action could not be sustained on the testamentary bond of the defendant, because the property of *Leonard Williams*, never came into her hands, being all wasted by *Walter Williams*; so that even if letters *d. b. n.* were taken out on *Leonard Williams*' estate, there could be no recovery if the goods were wasted before 1820, and such is the fact, though it does not appear upon the record. This matter is mentioned by way of showing that the plaintiff would have no redress, unless by the present action.

Let the court also suppose, that the plaintiff's claim is the only one unsettled, in an estate of five or six thousand dol-

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lars: that the balance of the estate belonged to *Walter Williams*, who wasted or converted it: that if the plaintiff should fail in this action, he can in no way recover his debt without obtaining letters *d. b. n.* and reducing into possession by an action against the defendant, the whole of the personal estate wasted by *Walter Williams*, and that the balance of the estate goes to the defendant. Would not this be an unnecessarily roundabout way to effect what might be done immediately, and without vexation to either party? Should the court also suppose that *Walter Williams*, as residuary legatee in *Leonard Williams'* will, gave bond to pay debts and legacies according to 1798, *ch. 101, sub-ch. 14, sec. 6*, (and I am not certain whether such is not the fact,) can there be letters *d. b. n.* granted? or if granted, how would an action be sustained by the administrator *d. b. n.* on such bond, there being no inventory, &c.? The creditor is not bound to sue on the bond in the first instance; on the contrary, such a bond is a testamentary bond within the meaning of the act to prevent rigorous prosecution of testamentary and administration bonds, and the creditor would have to proceed on it against the executor, and have a *non est* or *nulla bona* returned before he could sue the bond.

It is not necessary that such matters should be stated in the declaration. In actions against the executor of an executor, it is only necessary to declare in common form, that the debtor, nor his executor, nor the executor of the executor, paid the money, and the general conclusion of law is, that the executor is bound unless he shows in his plea to the contrary. *Vide 1 Harr. Ent.*

In 1785, *ch. 80, sec. 2*, the heir or devisee is bound in the same way. The defendant as residuary legatee of *Walter Williams*, is entitled to letters *d. b. n.* on *Leonard Williams'* estate. Should she take out letters *d. b. n.* no proceeding would or could be taken by her to recover the property converted, and the plaintiff would have to rely on the same acts now before the court. She, as executrix of her husband, would be bound by his bond, and could not sue herself.

Upon the second point, I refer to *Ord vs. Fenwick*, 3 *East*. 104, where in an action by an administrator, he declared in *assumpsit* for money paid by him as administrator, to the use of defendant. It was objected that such an action could not be supported by him as administrator, but must be brought in his own name. But the court said that if any case could be put, where the administrator could be supposed to have paid money as administrator, the judgment must be for him. The rule to be drawn from this case is equally applicable, when the administrator is defendant, and it seems that the judgment here ought to be reversed, if the plaintiff can show *any case* where an executor of an executor would be liable; and surely the executor of an executor *de son tort*, who has property under a fraudulent bill of sale, and converts it into money and dies, is liable to the creditors of the vendor either under 30 *Car.* 2, *ch.* 7, or 1798, *ch.* 101, *ch.* 8, *sec.* 5; for there the property never could by any possibility whatever, go into the hands of the administrator *d. b. n.* as this court has determined in *Dorsey vs. Smithson*, 6 *Harr. and Johns.* 61. So it is also, as I contend, when a bond is given by a residuary legatee, to pay debts and legacies when it would be impossible to come at the property, there being no inventory, and if letters *d. b. n.* were granted, they would be nugatory. Such a bond would be conclusive to bind the defendant in this action, and she could not dispute the fact of the conversion of assets by *Walter Williams*.

On these grounds the plaintiff contends that the judgment of the court below ought to be reversed, and a judgment given for the appellant.

F. S. Key, for the appellee, contended:

The counsel for the plaintiff has ingeniously called to his aid two *English* statutes, entirely inconsistent with our testamentary system. They were necessary in England, for there the granting of letters testamentary *de bonis non*,

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was confined to particular cases, so that the remedy given by those statutes was necessary. Here it is otherwise. There is no case where an executor or administrator dies without finally settling the intestate or testator's estate, that letters *d. b. n.* are not grantable, and not only grantable, but required to be granted. And nothing can be done with the unadministered assets in any other way. 1798, *ch. 101, sub-ch. 5, sec. 6.* If a creditor can come at them by an immediate suit against the executor or administrator of the first executor or administrator, why may not a distributee? and how are their proportions of such assets to be ascertained? and how is the bond of the second administrator to be made liable for the faithful administration of these unadministered assets, left by the first executor or administrator? for it is plain that the condition of the bond of the second administrator or executor, only applies to the estate of the person on which he administers, and not to the estate of another person on whom that person administered. There is moreover, no privity between these two administrators. Our system is an improvement upon the testamentary law of *England*. We require that what is left unadministered, shall be again brought under administration, and pass through the Orphans Court, under letters *de bonis non*. Then there will be a bond to secure their faithful administration, and a tribunal to ascertain the proportions, settle the accounts, and order distribution. Where there has been a *devastavit*, it is the same thing. Still by the section above quoted, there must be letters *d. b. n.*, for the estate is not "fully administered." Nor is there any difficulty about the administrator *d. b. n.* having a right to recover the wasted assets, either under the law of 1798 or of 1820. The power conferred on such administrator by the law of 1798, *ch. 101, sub-ch. 14, sec. 2*, is to "administer all things herein described as assets," (i. e. "every species of personal property,") "not converted into money, and not distributed or delivered, or retained by the former executor or administrator under the court's direction." The law

meant to include every thing that could be administered. The exception of things converted into money is corrected by the law of 1820.

That exception however, was an inadvertence. The law which had before required administrator *d. b. n.* wherever the estate was not fully administered of itself, gave to the administrator *d. b. n.* complete power over every thing not fully administered, and this is a better provision for creditors, and all persons interested in the estate, than the one afforded by the English statutes relied on.

As to the plaintiff's second objection, if the first executor being an executor *de son tort*, was necessary to enable the plaintiff to recover, it was an essential part of his case, and should have been alleged in his declaration. It is charged that he was executor, and this must be taken as lawful executor.

ARCHER, J., delivered the opinion of the court.

This is an action of *debt*, against the executor of an executor, on a single bill, suggesting a *devastavit*, by the first executor of the goods of his testator, and the question submitted by the demurrer is, whether the action is maintainable. At common law, no executor was answerable for a *devastavit* by his principal. 1 *Saund.* 219, *no. C. 2. Bac. Abrid.* 445, and the reason assigned in the latter authority, was because such executor could not be supposed to know, how his testator had disposed of the goods, and therefore this was esteemed *actio personalis, quæ moritur cum persona*. But it being found inconvenient, that when an executor made an alteration of the goods of the testator and died, that creditors to the first testator should be disappointed in the collection of their debts, a statute was passed in the 30th year, *Chas. 2d. ch. 7*, giving to creditors a right to recover their debts of the executors and administrators of executors in their own wrong. In 4 and 5, *Williams and Mary, ch. 24*, it is recited that it had been doubted whether 30 *Chas. 2, ch. 7*, extended to any executor or any administrator of

an executor or administrator of right, who for want of privity in law was not before answerable, and is “enacted and declared that all and every the executor and executors, administrator and administrators of such executor or administrator of right, who shall waste or convert to his own use, goods, chattels or estate, of his testator or intestate, shall from thenceforth be liable and chargeable in *the same manner as his or their testator or intestate should or might have been.*” *Williams* in his notes on *Saunders*, 1 vol. 219. *i. e.* in pointing out the distinction between an action against the executor himself upon a judgment suggesting a *devastavit* by him, and one against the executor of such executor, suggesting a *devastavit* by the former executor, says, the former action can only be brought upon a judgment previously obtained against the executor, *de bonis testatoris*, or where he is made a party to a judgment against a testator by *scire facias*; but in *the other*, an action may be brought in every case where the executor in his life-time, was in any way guilty of any act which amounts in law to a *devastavit*, and this position is clearly sanctioned, by the very words of the statute of *William and Mary*, which makes such executor “chargeable in the same manner as his testator should or might have been.”

There can be little doubt, but that these statutes were in force in this State. They concerned the administration of justice, and it has always been understood that the judges under the old government laid it down as a general rule, that all statutes for the administration of justice, whether made before or after the charter, so far as they were applicable, should be adopted. *Kilty's Rep. on Stat. Intro.* 6.

The statute 30 *Chas.* 2, *ch.* 7, is reported by *Kilty* to have been found applicable, and to have been used and practiced under, but the same author has considered that the 4 and 5 *William and Mary*, *ch.* 24, was not in force. As it regards many of the provisions of this statute, the remark is undoubtedly true; but so far as regards that part of this statute which relates to the subject under consideration,

we apprehend the compiler was in error, for had it not been for this law, the statute 30 *Chas. 2, ch. 7*, would have expired by its own limitation, and it is in the nature of a declaratory law, expounding the statute of 30 *Chas. 2*. If it be true that 30 *Chas. 2, ch. 7*, was in force up to the period of the revolution, it could only have been so in virtue of the statute, 4 and 5 *William and Mary, ch. 24*, which made the same perpetual. But it is supposed that these statutes are superseded, and rendered entirely unnecessary by our testamentary laws. But a careful examination of them brought us to a different conclusion. Unless the plaintiff can obtain his remedy in the manner he has sought it, insuperable difficulties will be opposed to his recovery by any other course. We speak now on the supposition, that there has been an actual, and not a mere technical *devastavit* of the goods. If the action thus conceived cannot be supported, the present creditor could only look to the administrator *de bonis non*, on the estate of the first testator, and we think there could be no recovery against him, unless such administrator had other goods than those wasted. The act of 1798, *ch. 101, sub-ch. 14, sec. 2*, makes it the duty of administrators *de bonis non*, to administer all things in that act described as assets, not converted into money, and not distributed or delivered, or retained under the court's direction. In the passage of this law, it is clear that the legislature did not mean to make any thing the subject of administration in the hands of the administrator *de bonis non*, which did not exist in specie. If property had been converted into money, such money was not the subject of administration, but the estate of the first executor or administrator was liable therefor, as for a *devastavit*, although such executor or administrator had failed to deliver over assets in his hands, yet the legislature never contemplated, if such assets had not at the time of the granting of the letters *de bonis non* any existence, but were wasted and destroyed, that they should be the subject of administration. They could not in the nature of things be assets;

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damages for such waste might have been made assets, and power might have been given to such administration to recover such damages; but such is not the fact. The acts of assembly are silent upon the subject. The act of assembly of 1820, *ch. 174, sec. 3*, extends only to bonds, notes, accounts and evidences of debt, which the deceased executor or administrator, may have taken, received or had as executor or administrator, and to money in his hands, and gives power to the administrator *de bonis non*, to recover the same by an action on the bond. Had this act given a similar remedy in cases of all personal property which had ever come to the hands of the first executor, there would have been no ground to sustain this action, for the remedy in such a state of the law, would have to be sought through the administrator *de bonis non*, and through him only; but where property, which has not been converted into money, and for which no evidence of debt has been taken, but has been wasted and destroyed, to creditors situated like the present plaintiff, there is no remedy, but by a resort to the estate of the delinquent executor or administrator. If indeed that be deficient, or such estate is apparently insolvent, such creditor may ultimately have recourse to the testamentary or administration bond. The judgment is reversed and judgment rendered for the plaintiff on the demurrer.

JUDGMENT REVERSED.

RICHMOND AND RICHMOND vs. DE YOUNG.—December,
1830.

It has long been the established practice of our courts, upon the production of a release of the principal under the Insolvent Laws of another State, by the special bail, to enter an *exoneretur* of the bail.

APPEAL from *Baltimore County Court*.

This was a *Scire Facias*, against *Meichel De Young*, as special bail of *C. E. Chevalier*. The writ issued on the 2d

August, 1828. At September term, 1826, of *Baltimore County Court*, the defendant had become the bail of *Chevalier*, against whom the present plaintiffs obtained judgment at September term, 1827. The declaration in the original action, counted upon a promissory note of *Chevalier*, bearing date at *Philadelphia*, the 17th November, 1825, for \$449 87, payable six months after date to the plaintiffs. And also contained the common counts.

By the 29th rule of *Baltimore County Court*, the principal may be surrendered in discharge of his bail, upon payment of costs at any time during the sitting of the court, to which the *scire facias* against the bail is returnable, and before the jury is discharged; but this privilege shall not extend to an adjourned court, when the first *scire facias* is returned *scire feci*, or *nihil* is returned upon a second *scire facias*.

The *scire facias* was returned at September term, 1828, "made known," whereupon the defendant, before the jury for that term was discharged, appeared and moved the court, to exonerate him as the bail of *Chevalier*, because he, *Chevalier*, had been discharged under the insolvent laws of *Pennsylvania*.

It was admitted that the plaintiffs at the time when the contract upon which the judgment was obtained, were, and ever since have been, citizens or residents of the State of *Rhode Island*, and that *Chevalier* was a citizen or resident of *Pennsylvania*. On the 15th October, 1827, *Chevalier* obtained his discharge from the Court of Common Pleas of *Philadelphia*, which ordered "that the said petitioner, *Chevalier*, shall not at any time hereafter be liable to imprisonment, by reason of any judgment or decree obtained for payment of money only, or for any debt, damage, cost, sum or sums of money, contracted, occurred, occasioned, owing, or becoming due before the time of such assignment." The law under which this discharge was granted, existed prior to the making of the original contract, and it was also agreed, that the facts and circumstan-

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ces of the case might be considered as if pleaded to the *scire facias*; that no objection should be taken to the motion upon the ground of form. The County Court [ARCHER, J.] adjudged that the defendant, *De Young*, should be exonerated and discharged from his bail aforesaid. Upon which the plaintiff appealed to this court.

The cause was argued before BUCHANAN, Ch. J., STEPHEN, and DORSEY, J.

By *Hinkley*, for the appellant, and *R. N. Martin*, for the appellee.

BUCHANAN, Ch. J., delivered the opinion of the court.

We think the special bail in this case was properly exonerated by *Baltimore County Court*.

As far as we have been able to trace the subject, it appears to us, to have been long the practice of the courts of this State, to discharge a special bail, on the production of evidence of the release of his principal, under the insolvent laws of another State. It was done by the late *General Court*, and is done, as far as we can ascertain, by the County Courts in the several judicial districts, in cases similar to this; and seeing nothing opposed to it, in the constitution of the *United States*, we are not disposed at this late day, to shake a practice so well, and as we think properly established. The judgment of the County Court, is therefore affirmed, with costs.

JUDGMENT AFFIRMED.

GEORGE BLIZZARD, Adm'r OF GEORGE P. MERRYMAN vs.
JACOBS, Adm'r OF JOHN JACOBS.—Dec. 1830.

The object of the act of 1825, *ch.* 167, throughout, is to prevent an accumulation of costs.

M and J gave their joint and several single bill, upon which an action was brought against the administrator of J. The defendant moved the court for

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a non-suit under the act of 1825, *ch.* 167, suggesting, that M was alive, and within the county at the institution of the suit. The County Court decided that a motion was a proper mode of bringing the question before the court, and awarded a non-suit. **HELD**, upon appeal, that the act of Assembly had no application to the case.

Where two obligors united in a bond, and one of them is dead, the 1st section of the act of 1825, *ch.* 67, does not prohibit separate actions against the survivor, and the representative of the deceased; nor does it apply where only one suit has been brought, although all the obligors are alive, and reside in the same county.

Where the obligors are all alive and reside in the same county, and the obligee elects to sue one of them only, he cannot bring another suit afterwards against the others, without being subject to a non-suit.

The office of the 2d section of the act of 1825, *ch.* 167, is to provide for the case of the death of one or more joint and several obligors, where the judgments being different, the surviving obligor or obligors cannot be united in the same action with the representative of the deceased obligor or obligors. There the creditor at his election may have one or two suits, one against the survivor, and another against the representative. Yet if there be more than one survivor living in the same county, he is as to them, restrained to one suit.

Where obligors live in different counties, the creditor may sue on both, or either, at his election. He is however restricted, as to original parties to his bond, to one suit in each county.

APPEAL from *Baltimore* County Court.

This was an action of *Debt*, brought on the 15th September, 1826, by the appellant, against the appellee, on the following single bill:

“Twelve months after date, we or either of us, do promise to pay or cause to be paid unto *George P. Merryman*, his heirs or assigns, the just sum of \$400, it being for value received of him. Witness our hands and seals, the 25th June, 1808.

Martico Merryman, (SEAL.)

John Jacobs, (SEAL.)”

The writ was returnable to *September* term, 1826, at which term, the defendant appeared and laid a rule on the plaintiff to declare. During that term, the plaintiff filed his declaration, and the single bill aforesaid; and at *March* term, 1827, laid a rule on the defendant to plead. The cause was continued to *September*, 1827, at which term the

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defendant moved the court to non-pros the action, upon the ground that the obligation on which the suit was founded, was executed by the defendant's intestate, in his life-time, together with a certain *Martico Merryman*. That *Merryman* survived the intestate, is still living, and now resides in *Baltimore* county, and that no suit or other proceeding was ever instituted against *Merryman*, upon the obligation aforesaid. This motion was accompanied by the defendant's affidavit to the facts. At the succeeding term, (March, 1828.) The County Court (HANSON and KELL, A. J.) decided:

1. That the truth of the facts upon which the motion was grounded, might be inquired into by the court, without the intervention of a jury.

2. That the evidence then offered, established the facts of the motion.

3. That under the act of 1825, *ch.* 167, the action must be non-prossed.

The plaintiff excepted to this judgment of the court, upon the following grounds:

1. Because the plaintiff ought to have pleaded the matters stated in the motion and evidence, and thus given the defendant the opportunity of trying the truth of the facts before a jury, or of replying thereto, and avoiding the effect of those facts by replication.

2. Because the motion was made too late, and should have been made at the appearance term, and before the rule to plead was laid.

3. That it was a motion in abatement upon merely technical grounds.

4. Because this action was not in opposition to the provisions of the act of 1825, which gives no authority to dismiss the action when only one suit has been brought.

The judgment of the County Court being for the defendant, the plaintiff appealed to this court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, and STEPHEN, J.

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Gwynn, for the appellant, contended, that the judgment of the County Court should be reversed for the reasons urged before the County Court. He cited, 1 *Chitty's Plead.* 215, *United States vs. Fisher*, 2 *Cranch* 386, 390. *The Mayor, &c. vs. Moore and Johnson*, 6 *Harr. and Johns.* 381. *Few vs. Marsteller*, 2 *Cranch*, 24. *Hall vs. Jacobs*, 4 *Harr. and Johns.* 245.

He also contended under the 4th reason, that the act of 1825 does not apply to any bill or obligation made before the passage of that act. That it did not prohibit a separate suit against any one of two or more obligors, or the legal representatives of any one of two or more obligors bound jointly and severally, if no other suit or action is brought on the same obligation. That there is no provision in the act expressly requiring or authorising the court to non-pros an action under the circumstances of this case.

J. Scott, and *R. N. Martin*, for the appellee, contended:

That under the act of 1825, *ch.* 167, the obligee might sue the surviving obligor, without suing the representative of the deceased. But if he sues the representative of the deceased obligor as in this case, he must also sue the survivor. The obligor has an option in one case, none in the other. The legislature intended that there should at any rate, be a proceeding against the survivor, in order that the representative of the deceased, if he was a surety and made to pay the money, should have an assignment of the judgment against the principal. Upon the construction of this act, they cited *Schooner Paulina vs. United States*, 7 *Cranch*, 52.

The objection that existing bonds are not embraced by the act of 1825, was not raised in the County Court; the point cannot be reviewed here. But the act does extend to such a bond, and it was competent for the legislature to pass it. It takes away no right; it merely regulates a remedy. The defence could not have been pleaded in bar. It was

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no bar. It does not deny the cause of action, nor shew it to have been avoided. It could not be pleaded in abatement; that goes to the writ. Here the writ was right. It was a mere irregular proceeding, and a motion was the proper mode of correcting it. 1 *Tidd Pr.* 139. 1 *Sellon Pr.* 101.

The objection was not too late. The rules of *Baltimore County Court* are not in the record, and therefore even if forbidden by them, the court cannot enforce them. 6 *Harr. and Johns.* 273.

But the objection is not one of mere form. It is a substantial one. The statute avoids the writ, and therefore the objection cannot be considered as waived. The objection may be made by motion. 1 *Tidd* 149. 3 *East.* 155. *King vs. Horne*, 4 *Durn and East.* 349.

The non-pros was the proper entry for proceeding, contrary to the act in the 2d, as well as in the 3d sec. The proceedings are at all events to be set aside, which is equivalent to a non-pros.

Under the act of 1825, all obligations are to be considered as joint, except as there provided; that is, when they reside in different counties, or one of the obligors is dead. The inconvenience of a law is no objection to it, if constitutional. 1 *Kent Com.* 419 to 431. *The People vs. Utica Insurance Company*, 15 *Johns.* 358. *Sickles vs. Sharp*, 13 *Johns.* 497. 4 *Harr. and McHen.* 165. *Union Bank vs. Ridgely*, 1 *Harr. and Gill*, 324.

BUCHANAN, C. J., delivered the opinion of the court.

This case depends upon the construction of the act of 1825, *ch.* 167.

The suit was brought on a joint and several single bill against the administrators of one of the obligors, the other obligor being alive at the time; and on motion, a judgment of *non-pros* was rendered, an affidavit being filed in court of the fact, that the other obligor was living, and that no process had been sued out or served upon him.

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The title of the act of 1825, *ch.* 167, is “an act to prevent the unnecessary accumulation of costs in civil suits;” and that is the object of the act throughout. The *first* section provides, that it shall not be lawful to institute more than one suit on a joint and several bond, penal or single bill, when the persons executing the same are *alive*, and *reside in the same county*, and that if more than one suit be instituted on any such bond, penal or single bill, judgment of *non-pros* shall be entered against the plaintiff or plaintiffs, in such suits.

In this case, both of the persons, executing the single bill on which the action was brought, were not alive at the time of instituting the suit, and if there had been at the same time, another action against the surviving obligor, it would not have been within the prohibition to institute more than one suit on a joint and several bond, penal or single bill, when the persons executing the same are alive. That prohibition being confined to the case of all the obligors being alive, without providing for the case of one or more being *dead*, and leaving to the obligor, besides his suit against the survivor or survivors, the liberty to sue also the representatives of the deceased obligor or obligors; nor is it within the provision, that if more than one suit be brought on any such bond, &c. judgment of *non-pros* shall be entered, there being but one suit. It is clearly then wholly unaffected by the first section; the words such bond, &c. in the first section, have reference to the case before mentioned, of all the obligors being alive. And though in such cases, not more than one suit is permitted to be brought, yet no obligation is imposed upon the obligee to sue all the obligors, (which by such a multiplication of parties, might produce an unnecessary accumulation of costs, contrary to the intention of the legislature,) but he may sue one only, if he pleases. If, however, he does so, it is at his own risk, and having made his election, he cannot afterwards bring another suit without being subject to be non-suited. Provision being thus made by the 1st *sec.* for preventing an

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unnecessary accumulation of costs, where all the obligors are alive; the office of the 2d sec. is to provide for the case of the death of one or more joint and several obligors, where the judgments being different, the surviving obligor or obligors cannot be united in the same suit, with the representatives of the deceased obligor or obligors. The language used is, "that if either of the said obligors shall be dead, then and in that case, it shall be the duty of such clerk to docket one action against the surviving obligor or obligors, and if requested so to do by the plaintiff or plaintiffs, or by his, her, or their attorney, it shall be the duty of such clerk to docket also an action against the executors or administrators of such deceased obligor, and to issue a summons, &c. and the same proceedings shall be had, and the same judgment entered thereon, as if separate actions had been brought against each and every obligor, in such joint and several bond, &c." The expressions used, are not very technical, and are somewhat obscure. But looking to the general object of the law, the saving of costs to the parties, it could not have been the intention of the legislature, to take from a creditor his right of election, which might be exercised with a saving of costs, by bringing only one suit either against the surviving obligor or the representatives of the deceased obligor, as might be deemed most expedient; and to compel him to bring suit, whether he would or not, against a surviving obligor, (as contended for by the counsel for the defendant,) who might be insolvent; with the privilege of suing also at his election, the representatives of the deceased, which might produce a very unnecessary accumulation of costs, contrary to the intention of the legislature, and operate injuriously to the creditor where the surviving obligor is insolvent, and sometimes vexatiously to the surviving obligor, as where he is only a security. We must search then for the intention of the legislature, which however obscurely expressed, or untechnical the language used, where it can be discovered, ought to be regarded. And keeping that rule in view in the construction of this

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act, we think the meaning of it is, not that the clerk must at all events, if one of the obligors be dead, docket a suit against a surviving obligor without directions, and whether the obligee or his counsel wish or not; but that as the surviving obligor and the representatives of the deceased obligor cannot be united in the same suit, and the obligee is entitled to his remedy against both, if he chooses to pursue it, two suits may be brought, one against the representatives of the deceased obligor, and the other against the survivor. And where it is said that it shall be the duty of the clerk to docket *one* action against the surviving obligor or obligors, the meaning is, that whether there be one or more obligors surviving, there shall be but one action against them, and that the creditor shall not be permitted to bring separate actions against the several surviving obligors, which is not provided against by the *first* section, where separate suits are only prohibited in the case of all the obligors being alive and living in the same county. And this view is strengthened by the circumstance, that in the 7th section, making provision for the case of obligors residing in different counties, which is not provided for in the 1st section. Similar expressions are used as to clerks docketting actions. The language of that section is, “that in case the obligors, &c. shall reside in different counties, then and in that case, it may be lawful for the clerk of the County Court to docket one action, &c. against the obligor or obligors in such bond, &c. who reside in the same county, and for the clerk of another County Court, to docket another action, &c. against the obligor or obligors who may reside in that county, &c.” The case of obligors residing in different counties, or of some being dead, not being provided for by the *first* section, and the bringing of more than one suit in such a case not being prohibited, the creditor could as before the passing of the act, have brought suits in different counties, or where some were dead, against the survivors, and also against the representatives of the deceased obligors, without the aid of the 2d section; and as it could not have been the

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intention of the legislature to drive an obligee to an unnecessary accumulation of costs, by compelling him to bring a useless suit against an insolvent obligor, and thus obliging him to sue also the representatives of the deceased obligor, or by compelling him to sue a surviving obligor who was only a security in the bond, &c. whether he wishes to do so or not; but rather to prevent a useless accumulation of costs, by restraining him from bringing more suits than the nature of the case may absolutely require. The 2d section must be understood as providing only against more suits than one, being brought against the surviving obligors, where there may be more than one; and the 7th section as providing against more suits than one, being brought in any county in which the obligors may reside. When they reside in different counties, no matter how many may reside in either county, the obligee is not required to bring suit in every county in which the obligors may reside, but may, if he chooses, bring one suit only, against such of the obligors as may reside in the same county, although there should be others residing in a different county. The provisions of the 7th section cannot be misunderstood, and the object of both is an unnecessary multiplication of suits, and the consequent accumulation of costs in the two cases not provided for by the 1st section. The one where some of the obligors are dead, and the other where they reside in different counties. We therefore think that the judgment of non-suit ought not to have been rendered.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

STATE, USE OF THE JUSTICES OF THE LEVY COURT OF
BALTIMORE COUNTY, vs. JOHN H. DORSEY, et al.
December, 1830.

The Levy Court of *Baltimore* county, having omitted to make the levy for the year 1823, between the 1st of March and 31st of December of that year, as they were bound to do by the act of 1817, ch. 22, were authorised by the act of 1823, ch. 23, to “make and close the levy for the year 1823, on or before the 1st of March, 1824.” HELD, that as the collectors of the levy were not to be appointed before the assessment was made, the act of 1823 carried with it an extension of the time for appointing those officers; or if it did not, their appointment under the act of 1817 was not restricted, as the laying of the levy was, to the 31st December of the year for which the tax was levied.

The Levy Court being a corporation, had power to accept and approve the bond of a collector appointed to collect the levy, authorised by the act of 1823, though not executed and filed with them until the 2d of March, 1824.

When a suit is brought on a private bond, &c. for the use of an individual, such person is not the legal plaintiff. The use is only entered for the protection of his equitable interest. If the c. q. u. dies pending the suit, his death is not the subject of a plea; nor is there for the purposes of the suit, any necessity for suggesting his death. The suit goes on as if he was still living or the use had never been entered. There is no reason why in the case of a public bond, with the privilege secured to any person interested to bring suit upon it, there should be any difference.

So where a Levy Court was abolished pending a suit brought in the name of the State, for the use of such Levy Court, against the obligors in a collector's bond, it was held, that a plea in abatement *puis darrein continuance*, that the Levy Court had been extinguished, was no objection to the further prosecution of the action.

In an action of debt on a bond with a collateral condition, where the defendant has pleaded general performance, and the plaintiff replied assigning a breach of the condition, it is a departure for the defendant to allege in his rejoinder, matter which shows the bond never had any legal existence.

It is a sufficient breach of the condition of a collector's bond, taken in pursuance of the acts of 1794, ch. 53, and 1817, ch. 142, that the collector did not finish and complete the collections of the assessment or rate imposed, &c. placed in his hands and accepted by him for collection, within one year and six months after the delivery to him of the copy of the account of assessment, and list of taxables required to be delivered to each collector.

The design of the act of 1815, ch. 173, allowing to collectors, one year after the expiration of the time for which they are appointed, to collect balances due them, was only to give them further time for their own benefit, to

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collect what they had neglected to collect in due time, in the same manner in which they might have made the collections, within the time prescribed.

CROSS APPEALS from *Baltimore County Court*.

This was an action of *Debt* brought in the name of *The State of Maryland*, for the use of the Justices of the Levy Court of *Baltimore* county, on the 14th of March, 1826, against the appellees, *John H. Dorsey*, *Nicholas Dorsey*, *Frederick Grapevine*, and *Leonard Pouder*, on a bond to the State of *Maryland*, dated and approved on the 2d of March, 1824, in the penalty of \$15,499, with the following condition. “Whereas the said *John H. Dorsey* hath been appointed by the Justices of the Levy Court for *Baltimore* county, one of the collectors of the county tax for the city of *Baltimore*, for the year 1823, within the 9th, 10th, 11th and 12th wards of the said city; the condition of the above obligation is such, that if the above bound *John H. Dorsey*, shall faithfully discharge his duties as such collector for the 9th, 10th, 11th and 12th wards within the said city, then the above obligation to be void, else be and remain in full force, &c.”

The defendants pleaded, 1st, general performance.

2d. That the said State, its, &c. because they say, that the justices of the Levy Court of *Baltimore* county did not, at any time during the year 1823, appoint the said *John H. Dorsey*, collector of the tax mentioned in the condition of the said writing obligatory; and the said defendants further say, that on the 19th day of February, in the year 1824, the following order was passed by the justices of the Levy Court of *Baltimore* county. “We, the subscribers, justices of the Levy Court for *Baltimore* county, have this day assessed and taxed the assessable property of the city and county of *Baltimore* for the year 1823, and apportioned the same agreeably to the foregoing levy list; and for the collection of the same, have appointed the following persons, viz. for the late first election district of the said county, now called collection district number one, we have

appointed, &c.; and for the city of *Baltimore*, we have appointed the following persons, viz: For the first, &c. and for the ninth, tenth, eleventh and twelfth wards of the said city, we have appointed *John H. Dorsey*. And the said several collectors, on entering into bond, according to the act of assembly, are hereby authorised and empowered to collect and receive from the owners of property assessed in the aforesaid districts and wards, the following rate or assessment, that is to say, on all the property assessed in the aforementioned several districts in the said county, the rate or sum of one dollar and ten cents on every hundred dollars, so as aforesaid assessed; and on all property assessed in the aforementioned wards in the said city, the sum or rate of sixty-three cents on every hundred dollars, so as aforesaid assessed; and the said several collectors are hereby authorised and required, if need be, to execute therefor, and pay the same over as the justices of the Levy Court of *Baltimore* county shall, from time to time direct. Given under our hands and seals, this 19th day of February, in the year of our Lord 1824." And that, after the passage of the said order, and on the second day of March next following, the said writing obligatory was executed and delivered to the said justices, and by them then approved and accepted, to wit, at the county aforesaid; and this the said defendants are ready to verify. Wherefore they pray judgment.

3d. "And the said defendants, further defend, &c. and say, that the said State, its, &c. because they say, that since the commencement of this present term of *Baltimore* County Court, and prior to filing this plea, the justices of the Levy Court of *Baltimore* county, for whose use the said action of debt was instituted, as a court, have ceased to exist, and that no successors have been appointed to the said court hitherto; and this they are ready to verify, wherefore they pray judgment, if the State, &c.

4th. "And the said defendants, further defend, &c. and say, that the said State, its, &c. because they say, that after

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the commencement of this present term of *Baltimore County Court*, and prior to the time of filing this plea, a body politic and corporate, by the name and style of the commissioners of *Baltimore county*, was duly created and established; the several individuals comprising the same, between the days and times aforesaid, having been duly elected such commissioners; and having also taken and subscribed, before a competent authority, the oath required by law, of each of such commissioners; and the said defendants do further say, that after such election and qualification of the several commissioners of *Baltimore county*, and prior to the time of filing this plea, *the Mayor and City Council of Baltimore* did duly and legally provide and enact, that the collectors of the aforesaid county tax, of which the said *John H. Dorsey* was one, should pay to the register of the city of *Baltimore*, all such sums of money as they, the said collectors, had received from the taxes imposed by the authority of the Levy Court of *Baltimore county*; and so the said defendants say, that the right of action of the said justices of the Levy Court of *Baltimore county*, on the bond declared on in this suit, if any, since the institution of this suit, has been extinguished, and this, &c.

To the *second, third and fourth* pleas, the plaintiff demurred generally, and the defendants joined in demurrer.

To the *1st plea* the State replied as follows; viz: that the plaintiff ought not to be barred, &c. because the said plaintiff says, that after the making of the said writing obligatory, and before the commencement of this suit, to wit, on the third day of March, in the year 1824, at the county aforesaid, the justices of the Levy Court of *Baltimore county* aforesaid, directed and caused the clerk of *Baltimore County Court*, to deliver to, and place in the hands of the said *John H. Dorsey*, as one of the collectors of the county tax for the city of *Baltimore*, for the year 1823, within the ninth, tenth, eleventh and twelfth wards of the said city, in the said condition of the said writing obligatory men-

tioned, a fair copy of the fair and accurate account kept by the said clerk of the assessment or rate imposed and levied by the said Levy Court, as by law directed and authorised, on the assessable property within the said wards of the city of *Baltimore*, as a county tax for the year 1823, and an alphabetical list of the names of the persons who then were owners of the said assessed property, in each of the said wards, and liable as well as the said property for the payment of the said assessment or rate, so imposed and levied thereon, with the amount of each of the said person's assessment or proportion of the said county tax annexed, to be collected, paid and accounted for, by the said *John H. Dorsey*, as such collector aforesaid, within the time, and in the manner prescribed by law; and the said *John H. Dorsey*, as such collector aforesaid, mentioned in the said condition of the said writing obligatory, then and there received and accepted the said copy of the account of assessment and lists of the persons and amounts assessed for collection, and to be paid and accounted for as aforesaid. And the said plaintiff avers, that the whole amount of the county tax for the year 1823, so levied and imposed on the assessable property within the said wards of the city of *Baltimore*, as specified in the said copy of the account of assessment and lists, so delivered to, and accepted by the said *John H. Dorsey*, as such collector aforesaid, including the commission of six per cent. allowed to him for the collection thereof, was and is, a large sum of money, to wit, the sum of \$7972 17, to wit, at the county aforesaid. And the said plaintiff further says, that the said *John H. Dorsey*, as such collector aforesaid, on and by the said delivery to, and receipt by him, of the said copy of the account of assessment and lists aforesaid, so placed in his hands, and accepted by him for collection as aforesaid, was duly and lawfully authorised, and it became and was his duty, as by law prescribed and required, within twenty days thereafter, to wit, at the county aforesaid, to proceed to collect the said assessment or rate, to the amount of the said sum last

above mentioned, as specified in the said copy of the account of assessment and lists so placed in his hands, and by him accepted for collection, and to finish and complete the collections of the same in the several wards aforesaid, within one year and six months after the delivery to and receipt by him, of the said copy of the said assessment and lists; yet the said *John H. Dorsey*, regardless of his duty as such collector aforesaid, did not finish and complete the collections of the assessment or rate so imposed and levied as a county tax for the year 1823, on the assessable property within the said wards of the city of *Baltimore*, and placed in his hands and accepted by him for collection, as such collector aforesaid, within one year and six months after the delivery to and receipt by him, of the said copy of the account of assessment and lists aforesaid; but wholly neglected and refused, although often requested, to finish and complete the collections of the assessments so placed in his hands, and still doth neglect and refuse so to do; and therefore the said plaintiff says that the said *John H. Dorsey* hath not faithfully discharged his duties as one of the collectors of the county tax for the city of *Baltimore*, for the year 1823, within the said wards of the said city, but therein hath wholly failed and made default, contrary, &c. and this, &c.

And for assigning a further breach of the condition of the said writing obligatory, the plaintiff says, that after the making of the said writing obligatory, and after the delivery to, and receipt by *John H. Dorsey*, as such collector aforesaid, of the copy of the amount of assessment, and list of names and amount of county tax to be by him collected, for the year 1823, for the ninth, tenth, eleventh and twelfth wards within the city of *Baltimore*, to wit, at the county aforesaid, it became and was by law the duty of the said *John H. Dorsey*, as such collector, to pay and account for the amount of the sums so by him to be collected, as specified in the said lists, in such manner and at such time as the said Levy Court of *Baltimore* county should direct and appoint.

And the said plaintiff further says, that the said Levy Court, afterwards, to wit, on the 7th of September, 1825, at, &c. did direct and appoint that the said *John H. Dorsey*, should pay and account for the collections of the assessments so placed in his hands as aforesaid, to the justices of the Levy Court of *Baltimore* county aforesaid, on or before the first Tuesday in March next thereafter, to wit, &c. whereof the said *John H. Dorsey*, had notice. And the said plaintiff avers, that the amount of the collections of the assessments of the said county tax for the year 1823, for the said wards which it was the duty of the said *John H. Dorsey*, as collector to have paid to the justices of the Levy Court of *Baltimore* county, on or before the said, &c. was the sum of \$7,493 84; yet the said *John H. Dorsey*, regardless of his duty as such collector, did not, on or before the said, &c. pay or account for the collections of the said assessments so placed in his hands, and by him accepted, or any part thereof, to the justices of the Levy Court of *Baltimore* county aforesaid, but the said *John H. Dorsey*, although often requested by the said Levy Court, to wit, &c. hath always hitherto refused, and still doth refuse, to pay or account for the same, or any part thereof; and so the said plaintiff says that the said *John H. Dorsey*, hath not faithfully discharged his duties as one, &c.

To these breaches the defendants rejoined as follows; that as to the *first* breach assigned by the said State in its replication, they say, that the said State, its action, &c. because they say, that the justices of the Levy Court of *Baltimore* county did not at any time during the year 1823, appoint the said *John H. Dorsey* collector of the tax mentioned in the condition of the said writing obligatory. And the defendants further say, that on the 19th day of February, in the year 1824, the following order was passed by the justices of the Levy Court of *Baltimore* county, (setting out the order recited in the 2d plea,) and that after the passage of the said order, and on the 2d day of March next following, the said writing obligatory was executed

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and delivered to the said justices, and by them then approved and accepted, to wit, at the county aforesaid; and this the said defendants are ready to verify; wherefore they pray judgment, &c.

And the said defendants, as to the *second* breach assigned by the said plaintiff, say, that the justices of the Levy Court of *Baltimore* county, did not direct and appoint that the said *John H. Dorsey*, as collector aforesaid, should pay and account for the collections and assessments placed in his hands, to the justices of the said Levy Court, on or before the first Tuesday in March, 1826, and that he the said *John H. Dorsey* had not notice of any such direction and appointment; and of this the said defendants put themselves upon the country.

To the defendants' rejoinder to the plaintiff's *first* breach, the plaintiff demurred generally, and the defendant joined in demurrer. An issue was joined upon the rejoinder to the *second* breach assigned by the plaintiff.

The County Court [HANSON, A. J.] sustained the demurrers to the defendants' 3d and 4th pleas, and also the demurrer to the defendants' rejoinder to the *first* breach, assigned in the replication of the plaintiff to the defendants' *first* plea; but overruled the demurrer to the *second* plea, and gave final judgment for the defendants, whereupon both parties appealed to this court.

The cause came on to be argued before BUCHANAN, Ch. J., EARLE, MARTIN, STEPHEN, and DORSEY, J.

The following acts of assembly are referred to in this cause.

1794, *ch.* 53, enacts, that the justices of the Levy Courts, in their respective counties, "are authorised and required on some day, between the 1st March, and the 1st October, annually, to meet at, &c. to adjust the ordinary and necessary expenses of their several counties; to impose an assessment or rate on all property within their county, sufficient

to defray such county charge; and the said justices shall apportion such assessment or rate, and shall appoint a person or persons to collect the same, and every collector, before he acts as such, shall give bond, payable to the State, such as the said justices shall approve of, in double the sum to be collected, with condition," &c.

1817, *ch. 22*, after a preamble, stating that doubts are entertained of the validity of *some* of the acts of the court, because of their not being done within the time directed, *sec. 1*, enacts, "that the several assessments and levies of the public or county taxes, or charges made and imposed by the Levy Court of *Baltimore* county, and the several contracts or bonds made or taken in relation to the collection, or the payment or expenditure thereof, shall be held as effectual and valid as if the same had been fully completed, made or taken, within the time prescribed by law, provided the same shall not alter or affect the legal defence of the collectors against any claim or suit, which has been, or may be preferred against them, for any thing done heretofore."

Sec. 2, enacts, that the Levy Court of *Baltimore* county, "be, and it is hereby authorised and empowered to meet for the transaction of public business, at, &c. and on, or at such days and times as the said court shall consider expedient, between the 1st day of March, and the 31st day of December, in each and every year hereafter, and may continue by adjournment or otherwise, from day to day, or time to time, until the public business shall have been completed: *Provided nevertheless*, that the levy for each year shall be completed within the year."

Sec. 3, gave special power to complete the levy for the year 1817, appoint a collector, finish all the unsettled business of the county, and take a bond from the collector.

1817, *ch. 142, sec. 2*, authorised the Levy Court "to appoint as many collectors for the city of *Baltimore* as they may think necessary, who are to give bond in such penalty with such security as the said court shall approve."

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Sec. 3, enacts, "that the said collectors shall each and every of them finish and complete the collections of such of the assessments as may be placed in their hands, by the time prescribed by law, or assigned by the said court for the completion of the same, and shall pay and account for the same in such manner, and at such times as the said court shall direct or appoint."

1817, *ch.* 182, authorised the Levy Court of *Baltimore* county to appoint *as many* collectors as they deemed necessary, to collect the county tax for the year 1817, and declared, they should give such bonds as the court should prescribe.

1823, *ch.* 32, enacted, "that the Levy Court of *Baltimore* county, be, and they are hereby authorised and empowered to make and close the levy of the said county for the year 1823, on or before the 1st day of March, 1824." Passed 31st December, 1823.

Williams, (District Att'y, U. S.) and *Gwynn*, for the appellant, contended,

1. That the plaintiff is entitled to recover on this bond, notwithstanding the Levy Court of *Baltimore* county ceased to exist in November, 1827. 2. That the Levy Court had authority under the act of 1823, *ch.* 32, to appoint collectors of the levy for the year 1823, at any time previous to the 1st of March, 1824. 3. That the bond in question is good and valid in law, although not executed, nor approved before the 2d of March, 1824. 7 *Harr. and Johns.* 339, 343. 4. That the first breach in the replication, to the first plea is good in law, and that the rejoinder thereto furnishes no sufficient answer to the said breach. On the *first* point, they referred to the acts of 1817, *ch.* 142, *sec.* 2, and 1826, *ch.* 217. 1827, *ch.* 23. 2 *Harr. and Johns.* 45.

On the *second* point, to the act of 1794, *ch.* 53. 1817, *ch.* 22, *sec.* 2, 3. 1823, *ch.* 32. 1 *Kent's Com.* 431, &c. 7 *Harr. and Johns.* 79. On the *fourth* point they argued, that the breach was assigned in conformity to the act of 1794, *ch.* 53,

and that the rejoinder thereto is a departure from the plea of performance. To show what constitutes a departure, they referred to 2 *Johns. Dig.* 217. 11 *Johns. Rep.* 182. 20 *Ib.* 153. *Cox's Dig.* 109.

As upon the demurrer to the defendants' rejoinder to the first breach, the court is to go up to the first fault in pleading; the question is, upon the sufficiency of this breach, which charges the failure of *Dorsey* to collect—to show it to be a good assignment they cited 1 *Chitty Plead.* 326. 5 *Com. Dig. Plea. C.* 46. 2 *Harr. Ent.* 350, 408.

Gill, for the appellee, contended,

1. That under the act of 1794, *ch.* 53, which was the basis of the Levy Court system, those courts were commanded to discharge all their public duties between the 1st of March and 1st of October, in every year. They were courts of restricted and special jurisdiction, and had no power to act, but within those periods. *Levy Court vs. Merryman*, 7 *Harr. and John.* 88. That court could not approve and accept a collector's bond, but within the restricted period. The Legislature intended that the business of each year should be entirely transacted between those months; and the practice has uniformly been, when the court failed to perform its assigned duties within the prescribed period, to apply to the Legislature for new powers to cure the omission.

2. The act of 1817, *ch.* 22, enlarged the time for transacting the public business as to the city of Baltimore. The time fixed by that law was between the 1st of March and 31st December. It is contended that *Baltimore Levy Court* had no power to adjourn after the 31st December, for any purpose; or that if it had such power, it was only in relation to such unfinished business as was necessarily incidental to a levy, actually made before the 31st December. After that period, the Levy Court could not appoint a collector when the tax of the preceding year had not been ascertained, and consequently could neither accept nor approve of his bond.

3. That the act of 1817, *ch.* 142, was not intended to, and did not enlarge the time, within which the Levy Court was to perform its duties. It merely as regards this question, gave the power to increase the number of collectors within *Baltimore* county at discretion. It left the obligation, as to the time of making the appointment, precisely where it was under 1817, *ch.* 22. The same rule prevails as to approving the bond.

4. It is conceded by the whole case, that the Levy Court for the year 1823, totally failed to make the levy in time. They did no act towards it. The consequence was, an application to the Legislature to heal this defect.

5. The act of 1823, *ch.* 32, merely authorised the court "to make and close the levy of *Baltimore* county on or before the 1st March, 1824." This act was passed on the 31st December, 1823. Now from that period to the 1st March, 1824, the Levy Court, under the act of 1817, *ch.* 22, had no right to assemble or to act; or at most, had but a qualified right, viz. to meet and finish business incidental to the levy of 1823, ascertained prior to the 31st December, 1823.

6. The case presented then under the act of 1823, *ch.* 32, is precisely the same, as if the Levy Court was then called into existence for the first time. Its power to act, according to the principles of *Levy Court vs. Merryman*, was dependent entirely upon the act of 1823.

7. What then is the true construction of the act of 1823? The word levy has received in *Maryland*, by frequent acts of legislation, a meaning which leaves no doubt. It means the gross sum of money to be paid into the treasury; to make and close it, as respects the Levy Court, is the process, the calculation, by which it is ascertained and distributed among the taxable inhabitants. It does not relate to the appointment of a collector, nor include it. It has nothing to do with the approval of his bond. We know that in other cases, when the Legislature intended to heal similar defects, they gave express power to appoint collectors. 1800, *ch.* 1; 1817, *ch.* 22, *sec.* 3; 1817, *ch.* 182.

The conclusion from these positions is, that under the act of 1823, the Levy Court of *Baltimore* county, had no power to appoint a collector for the tax of 1823, nor to approve of his bond. That if they had such power, it must be exercised on or before the 1st of March, 1824, after which time they had no jurisdiction over the business of the year 1823, except to receive the tax if collected, and therefore the judgment of the county court upon the demurrer to the second plea, ought to be affirmed.

Under the act of 1817, *ch. 142, sec. 3*, it is contended, that a mere omission to finish and complete the collections within eighteen months, gives no cause of action. The object of the bond was to indemnify against a failure to pay within the time. Whether the collector collects or not, he is still responsible. He is bound to collect. He is armed with special summary powers to enable him to collect. The question in these cases always arises exclusively upon the failure to pay—now by this act, the collector was only to pay and account in such manner and at such times as the Levy Court should direct. The order of February, 1824, appointing this collector, is to this very same effect. It is not alleged in the first breach that the court ever gave directions how, when, to whom, or what time, this payment should be made. The money does not necessarily go to the Levy Court. The constant practice is to pay county creditors, under the order of the court. It is contended therefore, that the first breach assigned in the plaintiff's replication to the plea of general performance, is insufficient. Admitting the rejoinder to be a departure, the question still arises upon the character of the breach.

The 3d and 4th pleas allege the fact that pending the suit, the Levy Court of *Baltimore* county was abolished by competent authority, and this, it is contended, abated this action. The application of this doctrine depends, it is admitted, upon technical principles and the *Maryland* practice.

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We have here a custom of taking bonds payable to the State, in numerous instances. The right is universally conceded, that the parties for whose protection such bonds are taken, those who are really interested in their being fully and fairly complied with, may, upon their infringement, bring an action upon them. No application is made to the State, no special permission granted. The party interested of his own motion may put such bond in suit. The practice is to endorse the name on the writ, for the use, &c. The interest of the equitable plaintiff is disclosed in the assignment of the breach. That interest must exist when the action was commenced. A cause of action is supposed to be vested in the equitable plaintiff at that time. The State, the legal plaintiff, has no interest. The right to bring the action is an equitable one, granted from motives of convenience and public policy. So far for the plaintiffs. Then as to the defendants. This practice assumes, that there is always a competent person in *esse*, or likely to be in *esse* within a reasonable period, for the defendants to settle with; persons having a right to control the action, to dismiss it or enter satisfaction according to circumstances. This last party succeeds to the use, upon the death of the first *cestui que use*, because entitled to the right, and becomes responsible for costs in case of failure. The condition of defendants would be truly unfortunate, liable to the action of a nominal plaintiff, if this countervailing and protecting principle did not attach to and follow the action. In this case the action is not distinguishable from similar actions brought for the use of individuals—Except that this is a much stronger case; for the Legislature abolished the levy court of *Baltimore* county by the act of 1826, *ch.* 217. and have not transferred its outstanding suits and claims or debts, to any other tribunal. The Levy Court has no successor who can release or discharge the action when prosecuted to judgment. The demand sought to be enforced here, relates to the city of *Baltimore*; it is due for taxes collectable within the city, such a demand has not been

provided for by the act last mentioned. What is there then to prevent the application of the general principle, that upon the dissolution of a corporation, its debts are extinguished? This is a public municipal corporation. The Legislature has a right to abolish it at discretion, and resume its property. Now though they have abolished it, they have not resumed its debts nor transferred them. There is nothing then to except the case from the general rule. Will the form of the bond do it? When the *Maryland* practice comes to be considered, we think it will not. Should this action proceed, it must have the anomalous shape of an *ex parte* proceeding. It is concluded from these views, that this case is to be regarded substantially, as if it was the suit of the Levy Court, and there being no statutory assignment of its debts, the action abated upon the extinction of that corporation.

BUCHANAN, Ch. J., delivered the opinion of the court.

John H. Dorsey, one of the defendants, was appointed by the Levy Court of *Baltimore* county, on the 19th of February, 1824, one of the collectors of the county tax for the city of *Baltimore* for the year 1823, and on the 2d of March, 1824, he gave his bond to the *State*, conditioned for the faithful discharge of his duties as such collector, with the other defendants as his sureties. Upon that bond this suit was brought, to which the defendants pleaded. [Here the Judge referred to the pleadings and judgment of the county court as before set forth, and then said]—The question arising upon the demurrer to the *second* plea is, whether the Levy Court of *Baltimore* county, had any authority to appoint collectors of the tax, imposed for the year 1823, and to receive and approve their bonds, at any time after the 31st of December of that year. The 2d sec. of the act of 1817, ch. 22, authorises the Levy Court of *Baltimore* county, to meet for the transaction of public business, at such places in said county, and on, or at such days and times, as the said court shall consider expedient, be-

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tween the first day of March and the 31st day of December, in each and every year thereafter, and to continue by adjournment or otherwise, from day to day, or time to time, until the public business shall have been completed—with the proviso, “provided nevertheless, that the levy for each year shall be completed within the year.” By the 2d *sec.* of another act of the same year, *ch.* 142, the Levy Court is directed to appoint a number of collectors of the tax, who are required severally to give bond to the *State*, in such penalty, and with such security as the court shall prescribe and approve, conditioned for the faithful discharge of their duties as such. Upon which bonds suits are authorised to be brought by the Levy Court, or any person or persons interested therein. And by the act of 1823, *ch.* 32, authority is given to the Levy Court of *Baltimore* county, to make and close the levy for the year 1823, on or before the first day of March, 1824.

In the *State use Levy Court, &c. vs. Merryman, 7 Harr. and Johns.* 79, it was decided by this court, that under the act of 1794, *ch.* 10, authorising the justices of the Levy Courts of the several counties in the *State*, “to adjourn their respective courts from time to time, for the purpose of laying the levy;” and the act of the same year, *ch.* 53, requiring them “to meet on some day between the 1st of March, and the 1st of October annually, to adjust the ordinary and necessary expenses of their several counties, &c.; and to impose an assessment, &c. sufficient to defray such charges,” and “to appoint a person or persons, to collect the same,” they had no authority to impose an assessment, after the first of October, or to adjourn beyond that time. And it is perfectly clear, that under the proviso of the 2d *sec.* of the act of 1817, *ch.* 22, the Levy Court of *Baltimore* county, could not have imposed the assessment for the year 1823, after the 31st of December of that year, but for the act of 1823, *ch.* 32, extending the time to the 1st of March, 1824. It is supposed, and the course of the Legislature shows the understanding to have been, that the

Levy Court, was equally restricted in relation to the appointment of collectors. The 3d *sec.* of the act of 1817, *ch.* 22, passed 8th January, 1818, makes provision for completing the levy, and appointing a collector for the year 1817, and finishing the unsettled business of *Baltimore* county for that year, which would have been unnecessary in relation to the collectors, if the Levy Court could have appointed a collector after the 1st of October, 1817. And it is contended that under the 2d *sec.* of the same act, authorising the Levy Court to meet on some day between the 1st of March and 31st December annually, for the transaction of public business, they were restricted in the appointment of a collector to some time between those periods, and that the appointment of *John H. Dorsey*, on the 19th February, 1824, as collector of the tax for the year 1823, was illegal and void. But we do not think so. The collectors are required to give bond in such penalty as the court shall prescribe, and as the amount of the penalty of the bonds to be given, cannot be ascertained before the assessment is made by which it must be regulated, it would seem as if the law looked to the assessment being made, before the appointment of the collectors. It may therefore well be a question, whether the act of 1823, *ch.* 32, extending the time of making the levy for the year 1823, to the 1st of March, 1824, would not of itself, necessarily have carried with it, an extension of the time for appointing the collectors; and we are inclined to think it would, for there could be no necessity for appointing collectors, before the assessment was made. But be that as it may, the 2d *section* of the act of 1817, *ch.* 22, does not restrict the power of appointing collectors to a time within those limits. Inconveniences had grown out of the restriction before existing; legislation had been found necessary to make valid, appointments of collectors, and other acts of the Levy Court, not within the time prescribed, and to authorise the appointment of collectors after the limited time; to prevent which thereafter, seems to have been one of the objects of the 2d

section of 1817, *ch. 22*, which, after authorising the Levy Court to meet annually, between the 1st of March and the 31st of December, goes on to say, “and may continue by adjournment or otherwise, from day to day, or time to time, until the public business shall have been completed, provided nevertheless, that the levy for each year, shall be completed within the year.” Thus plainly indicating, that although the levy for each year must be completed within the year, yet that other parts of the public business need not be, but for the completion of which they are permitted to adjourn from day to day, &c., beyond the end of the year, if it should be found necessary. The proviso obviously showing, that completing the levy, was the only thing absolutely required to be done within the year. And though it would be unnecessary to appoint collectors, if the levy should not be made, yet that furnishes no reason for a different understanding of that section, for the law presumes that the Levy Court will always do their duty, by completing the levy within the time prescribed—and the act of December, 1823, *ch. 32*, provided against the contingency of their being no levy imposed for the year, by extending the time of imposing it, to the 1st of March, 1824. And the Levy Court being constituted a corporation and body politic, there can on no principle, be any well founded objection to the execution, and acceptance of the bond of *John H. Dorsey*, on the 2d of March, 1824.

The suit being brought in the name of the *State*, and entered for the use of the Levy Court of *Baltimore* county, the demurrers to the *third* and *fourth* pleas, present substantially but one and the same question; which is, whether the Levy Court of *Baltimore* county, having become extinct, and another body politic, and corporate, created in its place since the bringing of the suit, the action can be sustained? When a suit is brought on a private bond, &c. for the use of an individual, the individual for whose use it is entered, is not the legal plaintiff; the use is only entered for the protection of his equitable interest, and if he dies pending the suit, his

death is not the subject of a plea, nor is there for the purposes of the suit, any necessity for suggesting his death, but the suit goes on, as if he was still living, or the use had never been entered. The judgment is rendered in the name of the nominal, the legal plaintiff; and it is nothing to the defendant who may be entitled to the equitable interest. And we can perceive no reason, why in the case of a public bond, with the privilege secured to any person interested to bring suit upon it, there should be any difference. In either case, the suit must be brought in the name of the obligee. In the case of a private bond, the individual obligee is the legal plaintiff for the use of the person having the equitable interest; and in the case of a bond to the *State*, (as here) the *State* is the legal plaintiff; and there is no necessity for the purposes of the suit, to enter the use, whether it is brought for the benefit of an individual or a corporation; nor if entered, does it make any difference to the defendant, how it may vary or change as to the person asserting the same right. It does not affect his defence, nor can any change of the use become a fit subject of plea. The declaration or replication, in the case of a bond with a collateral condition, as this is, assigns the breach and discloses the use, or for what the suit is brought, and the defendant being thus advised, shapes his defence accordingly. The judgment is in the name of the *State*, and will, be for the use of whoever is entitled to the beneficial interest. We think the *third* and *fourth* pleas therefore bad, and that they were properly demurred to.

What has been said in relation to the *second* plea, applies equally to the rejoinder to the *first* breach, assigned in the replication to the *first* plea, with the addition that the rejoinder being of the matter of the *second* plea, it is clearly a departure from the defendant's *first* plea of general performance. It has, however, been contended, that the failure by *John H. Dorsey*, to finish and complete the collections of the tax imposed for the year 1823, within one year and six months after the delivery to him of a copy of

the account of assessment, &c. was not alone a breach of the condition of the bond, and therefore that the *first* breach assigned in the replication is insufficient, in not also stating that he did not pay or account, &c. and that we must mount up to the first fault. But we do not perceive the force of the objection. The act of 1794, *ch.* 53, requires that a collector shall proceed to collect the tax, &c. within six months after having received the assessment lists, &c.; and the 3d *section* of the act of 1817, *ch.* 142, requires that he “shall finish and complete the collections by the time prescribed by law, or assigned by the Levy Court for the completion of the same,” “and shall pay and account for the same, in such manner and at such times as the court shall direct and appoint.” Taking the two laws together then, (and they are parts of the same system) a collector is required to finish and complete the collections within six months after having received the assessment lists, &c. or by the time assigned by the Levy Court for the completion of the same, and also to pay and account for the same, in such manner and at such times as the court shall direct and appoint. Here then, are two distinct duties required to be performed; one to finish and complete the collections within six months, &c. or by the time assigned by the Levy Court—and the other to pay and account for the same, in such manner, and at such times as the court shall direct; the neglect to perform either of which, is a violation of the condition of the bond, for which an action will lie. And it was not necessary to sustain this suit, to add to the failure by *John H. Dorsey* to finish and complete the collections, &c. (which is the first breach assigned) a neglect to pay and account, &c. which is, of itself, a separate and distinct breach of duty. Here the breach assigned is, that he did not finish and complete the collections within one year and six months, &c. which covers the whole time prescribed by law; the act of 1815, *ch.* 173, allowing to collectors one year after the expiration of the time for which they are appointed, to collect the balances that may be due to them, in

no way relieving them from their liability or their bonds for not finishing the collections within six months ; but only giving them for their own benefit and security, the privilege of collecting what they had neglected to collect in due time, in the same manner in which they might have made the collections within the time prescribed, which otherwise they could not have done.

We concur in opinion with the court below, on the demurrers to the *third* and *fourth* pleas, and rejoinder to the *first* breach assigned in the replication ; but dissent from the opinion expressed on the demurrer to the *second* plea.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

THE STATE *vs.* SCHARFF, *et al.*

In an action upon a collector's bond given to secure the collection of taxes, the collector cannot place his defence on the non-delivery, by the clerk of the County Court, to him, of the rate of the assessment and list of taxable inhabitants, unless he states in his plea, that he had applied for the rate and list to the proper officer, and that he either refused or neglected to furnish them. It is the duty of the clerk to deliver the lists at his office, where all his official acts are done, and the collector should apply for them there.

This was an appeal from *Baltimore* County Court, decided at June, 1829. It was argued before BUCHANAN, Ch. J., EARLE, STEPHEN, and ARCHER, J.,

By *Taney*, (Attorney General) and *Gill* for the State.
No counsel appeared for the appellee.

The opinion of the court, deciding the above question, was delivered by ARCHER, J.

 Glasgow vs. Sands.—1830.

W. R. GLASGOW, Adm'r. of BROWNING, vs. J. SANDS,
Trustee of BAILEY—*December, 1830.*

The Commissioners of Insolvent Debtors for the city and county of *Baltimore*, after having appointed a permanent trustee, and certified to *Baltimore* County Court, that the debtor hath *not* complied with the terms and conditions of the insolvent laws, may, upon the neglect of such trustee to give bond within a reasonable time, appoint a new permanent trustee.

The *choses in action* of a deceased wife, vest in the trustee of her surviving husband, on his application for a discharge under the insolvent laws, although the husband is reported against, and does not obtain a final release.

APPEAL from a decree of the Orphans Court of *Baltimore* County.

John Sands, as permanent trustee of *George W. Bailey*, filed his petition in the Orphans Court of *Baltimore* County, to recover from the appellant a sum of money which he alleged was due to *Bailey* prior to his insolvency, from *Browning's* estate. The following statement, exhibits the whole case:

“It is admitted that *William R. Glasgow* was, on the 8th September, 1826, appointed by the Orphans Court of *Baltimore* County, administrator d. b. n. c. t. a. of *P. G. Browning*, then deceased; that on the 21st of September, 1826, *Glasgow*, as administrator, settled an account of his administration by which he was indebted to the said deceased's estate the sum of \$1532:82; that *Mary Ann Browning*, daughter of said *P. G. B.* became and was entitled under the will of her father, to one-sixth part of the said balance, being the sum of \$255:40½; that said *M. A. B.* was, after the death of her father, lawfully married to a certain *George W. Bailey*; that before payment of any part of the said sum of \$255:40½, she departed this life; that after the death of his wife and before payment of the said sum of \$255:40½ or any part thereof, and on the 7th December, 1826, *G. W. B.* then a resident of the city of *Baltimore*, applied to the *Commissioners of Insolvent Debtors in and for the city and*

county of *Baltimore*, for the benefit of the Insolvent Laws, and obtained a personal discharge, and on the same day, the said *John Sands* was appointed by the said commissioners, provisional trustee of the said *G. W. B.* and as such gave bond with security; that on the 15th January, 1827, a certain *Ritson Browning* was appointed by the said commissioners, the permanent trustee of the said *G. W. B.* but never gave bond as such permanent trustee, and no deed of assignment was executed by said *John Sands* to said *R. B.*; that on the 21st day of April, 1827, the said commissioners made the following report:—"In the case of *George W. Bailey*, an applicant for the benefit of the insolvent laws of *Maryland*, the undersigned commissioners of insolvent debtors for the city and county of *Baltimore*, in pursuance of the act of Assembly, do report to *Baltimore County Court*, that having diligently inquired and examined into the nature and circumstances of the said application, it appears, upon such examination, that the said *Baily* hath *not* complied with the terms and conditions of the said insolvent laws, and hath *not* acted fairly and *bona fide*; and the said commissioners now return to the office of the clerk of the said court, there to be recorded, the schedule, and all the proceedings which have been had before them in the matter of the said application. Given under our hands this 21st April, 1827, &c."

It is further admitted, that on the 10th of May, 1828, the said *John Sands*, who was recommended by a majority of the creditors of the said *G. W. B.* was appointed by the said commissioners the permanent trustee of the said *G. W. B.*, and as such gave bond, with security, which security was approved of by the said commissioners, and a copy of which bond is as follows, &c. "That after the application to the said commissioners of the said *G. W. B.*, and on the 14th February, 1827, *Bailey* executed and delivered a release to *Glasgow*, in consideration of \$50, of his claim in right of his wife, under her father's will. That at the time the said *G. W. B.* signed the release, there was written on

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the same, and signed by *William T. Browning*, a memorandum, guaranteeing the said *Glasgow*, from any claim from *R. B.* as trustee of *Bailey*. It is further admitted that the release, together with the memorandum thereon, was delivered to *W. R. G.* on the day it bears date, and that *W. R. G.* then knew that *G. W. B.* had applied for the benefit of the insolvent laws, and was informed by *Bailey* that he intended to withdraw his application, which was in fact never done."

Upon the foregoing statement of facts, the parties, *John Sands* and *William R. Glasgow*, pray the opinion of the Orphans Court of *Baltimore* county, as to the right of said *W. R. G.* to be allowed in the settlement of his second account with the Orphans Court, the sum of \$255 40 $\frac{1}{2}$, as so much money paid by him to said *G. W. B.*, and as to the right of said *John Sands* to a decree or order, directing the said *W. R. G.* to pay over to him the said *J. S.* the sum of \$255 40 $\frac{1}{2}$, with interest from the 21st day of September, in the year 1826.

The Orphans Court thereupon passed the following decree :

"The court having considered the petition, the answer thereto, and the statement of facts filed in the cause by the counsel of the parties, is of the opinion that the said *William R. Glasgow*, as administrator, is not entitled to a credit in his administration account, for the proportion of *Mary Ann*, the daughter of the said deceased, and who intermarried with *George W. Bailey*, and for which proportion the said *Glasgow* now claims to be allowed the sum of \$255 40 $\frac{1}{2}$, as paid or satisfied to the said *George W. Bailey*; the court being of the opinion, that inasmuch as it is admitted that no part of the same was paid by the said *Glasgow*, before the said *Bailey* applied for the benefit of the insolvent laws of this State, and had a trustee appointed, and that said *Glasgow* had information that said *Bailey* had thus applied for the benefit of the insolvent laws, that said *Glasgow* ought not to have paid any part of the same to the said *Bai-*

ley. It is therefore on this ninth day of February, 1829, ordered and decreed, that *William R. Glasgow*, administrator *de bonis non*, &c. of *Peregrine G. Browning*, deceased, pay to *John Sands*, trustee of the said *George W. Bailey*, the sum of \$255 40 $\frac{1}{2}$, being his proportion of the personal estate of the said deceased, in right of his wife, *Mary Ann*; and that he also pay costs."

From this decree *Glasgow* appealed to this court.

This cause was argued before BUCHANAN, Ch. J., STEPHEN, and DORSEY, J.

Williamson, for the appellant, contended,

That after the commissioners of insolvency in and for the city and county of *Baltimore*, have made a final report, upon the application of an insolvent debtor, for the benefit of the insolvent laws of the State of *Maryland*, to *Baltimore County Court*, they are divested of all power over the application and proceedings of the insolvent debtor, and cannot, therefore, appoint a permanent trustee after such report; and having no authority to appoint the trustee, *John Sands* is not in fact, permanent trustee, and cannot therefore, act as such. That the distributive share of *Browning's* estate, to which *Bailey* was entitled in right of his wife, was a *chose in action*, could not be, and was not assigned to the provisional trustee. It was not *Bailey's* property till reduced into possession. The provisional trustee had no right to reduce it into possession, *Bailey* being then the only person who could reduce it into possession, and having reduced it into possession for valuable consideration received from the administrator—the administrator should not be made to pay the amount to the trustee appointed after the execution of the release from *Bailey* to the administrator.

He cited 1816, ch. 221, sec. 2. 3. 1798, ch. 101, sub. 5, sec. 8. *Brown vs. Brice*, 2 Harr. and Gill, 24. *Leadenham vs. Nicholson*, 1 Ib. 278. *State vs. Krebs and Warner*, 6. Harr. and Johns. 34.

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Gill for the appellee, cited *Schuyler vs. Hoyle*, 5 John, C R. 206. *Stewart vs. Stewart*, 7 Ib. 247. *Hurt vs. Fisher*, 1 Harr. and Gill, 96. 2. *Madd*, 636. *Mitford vs. Mitford*, 9 Ves. Jr. 87. 2 Atk. 544. Act of 1819, ch. 84, sec. 1, 6. 1805, ch. 110, sec. 4.

DORSEY, J., delivered the opinion of the court.

By the argument in this case, two questions have been presented for our determination. *First*—whether the commissioners of insolvent debtors for the city and county of *Baltimore*, after having appointed a permanent trustee, and certified to *Baltimore* County Court that the applicant hath *not* complied with the terms and conditions of the insolvent laws, can, upon the neglect of such trustee to give the requisite bond within a reasonable time, appoint a new trustee? *Secondly*; whether a *chose in action* of a deceased wife is vested in the trustee of her surviving husband, an insolvent petitioner? By the act of 1816, which provides for the appointment of these commissioners of insolvency, applications for the benefit of the insolvent laws were made to *Baltimore* County Court, who referred them to the commissioners, who, after proceeding to the appointment, first, of a provisional, and then of a permanent trustee, were required to examine into the nature and circumstances of all such applications, and if, upon such examination, it appeared that the petitioner had complied with the terms and conditions of the insolvent laws, and had acted fairly and *bona fide*, they were to report the same to *Baltimore* County Court, “and return the schedule and all proceedings which may have been had before them, to the office of the clerk of *Baltimore* County Court, there to be recorded.” Under this law, the County Court were authorized to grant either a personal or final discharge to the petitioner: and if the examination by the commissioners resulted unfavorably to the applicant, no report thereof was to be made to the County Court, nor the schedule, or any of the proceedings before the commissioners returned.

With a view to relieve *Baltimore* County Court from many of the duties connected with applications for releases under our insolvent laws, to which it was still subject, the Legislature passed the act of 1819, *ch.* 84, investing the commissioners with the power of granting personal discharges, directing all applications of insolvents to be presented to them, instead of the County Court, and transferring to them all the powers of *Baltimore* County Court, or the judges thereof, in relation to such application, except the granting of final discharges and trying allegations, &c. It also enjoins the commissioners, “in case it shall appear to them that the applicant hath not complied with the terms and conditions of the insolvent laws, to certify the same to *Baltimore* County Court, and also to transmit to the clerk thereof, all deeds of assignment executed by any such applicant, or applicants, and all such other papers relating to the estate of such applicant or applicants, and brought before them as they may deem it proper to have preserved and recorded.” But it does not require, as in the case of their favorable report, a return of the schedule and all proceedings which may have been had before them. These, when their report is unfavorable to the applicant, remain in their custody, in order that they may comply with the injunction in the 6th *sec.* of the act of 1819, which declares that “when the report of the commissioners shall be unfavorable to the applicant or applicants, the said commissioners shall cause the trustee to proceed in the execution of the trust, in the same manner, and subject to the same rules, regulations, and restrictions, as if the report of the said commissioners, had been favorable to such applicant or applicants. By the 4th *sec.* of the act of 1805, *ch.* 110, which this court has said is part of the insolvent system, applicable as well to *Baltimore* city and county, as to the rest of the *State of Maryland*, the trustee before he proceeds to act, shall give bond to the *State of Maryland*, for the use of the creditors of the petitioning debtor, in such penalty as the County Court shall direct, and upon his “neglect to give bond

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as aforesaid in a reasonable time, to be judged of by the County Court," the County Court shall appoint such person as they shall think proper, in his place, who shall give bond as aforesaid." Upon viewing these several acts of assembly in connexion with each other, we think that the commissioners were authorized, under the circumstances in which they did so, to appoint *John Sands* the permanent trustee of *Bailey*, and to take bond from him as such. That the commissioners are invested with the power in the first instance, of appointing a permanent trustee, is obvious from the 3d sec. of the act of 1816, and the act of 1820, ch. 182; and by adverting to the 4th sec. of the act 1805, and the 1st and 6th sections of the act of 1819, we deem it equally clear, that they acted within the scope of their powers in making the appointment objected to in the case before us. The schedule of the petitioner in legal contemplation remained with the commissioners, and they only, perhaps, could therefore properly direct the penalty of the bond to be given by the trustee. By the act of 1819, their investiture with all the powers of *Baltimore County Court*, is as full and comprehensive as language could make it, and the peculiar and exclusive fitness of the commissioners for the discharge of the duty which they have assumed in this case, leaves no doubt in our minds of the legality or propriety of its exercise. Had the County Court have made the appointment, having no knowledge of the amount of debts due from or to the petitioner, or the value of his property, they would have had nothing to guide them in prescribing the penalty of the trustees' bond, which by law, it would be their duty to direct. Against the exercise of the power by the commissioners, no solid objection has been urged. 'Tis true in this case the schedule and all the proceedings before them, were returned to the clerk of the *Baltimore County Court*, to be recorded. But this does not vary the general principle applicable to like cases; it was done in obedience to no mandate of the law, in contemplation of

which the schedule and their proceedings were still in their custody.

In our present decision, we mean to intimate no opinion as to the power of the commissioners to make an appointment like the present, where their report to the County Court has been in favor of the insolvent debtor, and the schedule and all their proceedings returned therewith.

The second question we deem too clear to require either authority or illustration to sustain our opinion upon it. By the act of 1798, *ch.* 101, *sub-ch.* 5, *sec.* 8, it is enacted that “if the intestate be a married woman, it shall not, as heretofore, be necessary for her husband to take out letters of administration, but all her *choses in action* shall devolve upon her husband, in the same manner as if he had taken out such letters.” Under the provision of the act of assembly, *Bailey* might have collected the claim now in controversy, and have applied the same to his own use; he was competent to release, compromise, assign or dispose of it, in any way he might see fit; and to all the purposes of this controversy, it is to be regarded in the same light as if it were a debt or *chose in action*, due to *Bailey* himself, and consequently vested in the appellee upon his giving bond as required by law. The statutory assignment of the petitioner’s estate, is of all property which he has a claim, title to, or interest in, and of all debts, rights and claims, which he has, or is in any way entitled to.

DECREE AFFIRMED.

FRIDGE *vs.* THE STATE, use of KIRK.—*December*, 1830.

In an action upon a bond entered into by a guardian appointed by the Orphans Court, brought for the use of the ward, the mere fact that at the time of the guardian’s appointment, a natural guardian was in existence, does not invalidate the appointment and so render the bond a nullity. That court having jurisdiction to appoint a guardian in certain cases, even where there is a natural guardian, must be presumed to have acted rightly,

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when the question of the validity of the appointment arises incidentally, and nothing more than the existence of natural guardian appears.

The judgment of a court of competent jurisdiction, is, as to all matters decided by it, conclusive; and cannot be afterwards questioned by any other tribunal, when coming in incidentally.

So the appointment by the Orphans Court, of a person as guardian, who at the time was one of the judges of the court, cannot be afterwards questioned in an action upon his bond, though at the moment of the appointment, the court could not have acted without the concurrence of the individual appointed.

Where the condition of a bond recited that A was guardian, &c., neither the principal obligor nor surety therein, in an action upon such bond, can deny that he was guardian in the face of the recital, nor set up as a defence any supposed irregularity in obtaining the appointment.

An offer to pay only a part of a sum due, cannot avail a party as a tender. A creditor is under no obligation to accept less than the full amount due him.

A female, under the age of 21, cannot execute a release to her guardian, though she has capacity to receive payments from him at the age of 16—A release, which affords more protection to a guardian than a mere receipt, is in its nature and tendency to the prejudice of the infant, and opposed to sound policy.

Some contracts made by infants are binding, such as contracts for necessities. Some are void; and others are voidable only, such as contracts that may be for the benefit of the infant. A contract that a court can see and pronounce to be to the prejudice of the infant, is void.

The promissory note of a guardian given to an *infant* female ward over the age of 16 years, is no payment.

It is the duty of a guardian to a female ward, on her arrival at the age of 16 years, to exhibit a final account to the Orphans Court, and to deliver to the ward all her property in his hands. So far as the property of a ward in the guardian's hands consists of money, this constitutes a contract to pay money when she attained the age of 16, which is a day sufficiently certain in case of failure to pay, to entitle the ward to interest absolutely.

In an action in the name of the *State*, the obligee in a guardian's bond, the non-age of the *cestui que use*, the ward, who was more than 16, is no defence, and does not form the fit subject of a plea.

Cross Appeals from Baltimore County Court.

This was an action of *Debt* commenced on the 31st of January, 1825, in the name of the *State of Maryland*, at the instance, and for the use of *Eliza Ann Kirk*, against *Alexander Fridge*, on a bond executed by one *Owen Dorsey* as the principal, and the said *Fridge* and another as sureties, dated the 11th of April, 1817, conditional for the

faithful discharge of the trust of said *Dorsey*, as guardian to the said *Eliza Ann Kirk* and *Ann C. Kirk*. All errors in pleading on both sides were released; and it was agreed that either party might raise any objection, which could be raised by any form of pleading, or on motion.

1. At the trial, the plaintiff read in evidence the guardian's bond, and an account settled by the guardian with the Orphans Court of *Baltimore* county, on the 6th June, 1820, shewing a balance due *E. A. Kirk* of \$1018 77. And proved that *Eliza Ann Kirk*, at the time of the trial of this cause, was under the age of twenty-one years.

Thereupon the defendant, by his counsel, read in evidence, the following record: "The *State of Maryland*. At an Orphans Court held for *Baltimore* county, at the Court-house, in the city of *Baltimore*, on the 11th April, in the year 1817, present, *Owen Dorsey*, *James Carroll, Jr.* Esquires. Among other proceedings were the following, viz:—*Ann Catherine Kirk* and *Eliza Kirk*, orphan children of *Thomas Kirk*, deceased, come into court, and the court appoints *Owen Dorsey* their guardian, who here present in court accepts the guardianship, and offers *Alexander Fridge* and *John Mitchell*, as his securities, who are approved of by the court, and bond ordered to be executed accordingly. Bd. fd."—and also read the following account, which was duly proved. *Baltimore* county, sc.—The account of *Owen Dorsey*, guardian of *Eliza Ann Kirk*, orphan daughter of *Thomas Kirk*, late of said county, deceased.

1820.	June 6.	This accountant charges himself with the balance due on his last account rendered this date, amounting to,	- - - - -	\$1,018 77
1824.	July 7.	And with interest on \$922 25, from the 21st March, 1820, to this date,	- - - - -	237 57

\$1,256 34

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And he craves an allowance for the following payments and disbursements:

Cash paid at sundry times, &c. - - -	\$234 76
Cash paid his ward in full, as per release appears, - - - - -	1,021 58
Estate accounted for, - - - - -	<u>\$1,256 34</u>

And also read a full and formal release from *Eliza Ann Kirk* to *Owen Dorsey*, as her guardian, acknowledged and recorded according to law. And proved, that at the time of the appointment of said *Owen Dorsey*, the mother of said *Eliza Ann Kirk*, was living, and that no process appeared to have issued to bring her before the court, to renounce her right of guardianship.

Whereupon the plaintiff proved by one *Fielder Israel*, that a few weeks after *E. A. K.* arrived at the age of sixteen years, (as he understood from her mother,) she and her mother called upon said *Owen Dorsey* for a settlement; that said *D.* fixed a day to make such settlement, and on that day, the daughter and mother called; that *D.* then told them he had been disappointed in getting all the money, but that he had procured four or five hundred dollars, which she, *Miss K.*, could take, and let the affair remain until he got the balance; that *D.* then counted out the money, and laid it on the desk which lay between said *E.* and him, and which money, she could have taken up at any moment. The mother and daughter both declined taking the money; the mother telling *Mr. D.* that her daughter did not want, nor had any use for the money, and that they preferred it all should remain in his hands (except fifty or sixty dollars for which the daughter then had immediate occasion,) and receive interest for it, inasmuch, as if the money was taken from *Mr. D.* it would be deposited in bank, and the daughter would not receive the benefit of interest. *Mr. D.* then said, he would keep

the money, and pay interest therefor, and gave the daughter his note for the amount. He then took fifty or sixty dollars out of the money so counted down, which fifty or sixty dollars he paid to said *E.*, the rest of the four or five hundred dollars he put into his pocket, and gave to said *E.*, his promissory note for \$961 38, dated *Baltimore, July 15th, 1824*, payable on demand, with legal interest, on which, were endorsed a number of small payments, in all \$131 38; that *Dorsey*, before he gave such note, told *E.* and her mother, that *E.* must give him, *D.*, a release, to enable him to settle his account in the Orphans Court, which she consented to do; that *D.* directed witness to draw such release, who did so, but before he suffered *E.* to execute the same, he explained to her fully and minutely the nature and character thereof; and told her and her mother that the effect of it would be to discharge *Mr. D.* and his securities, on his guardian's bond and to retain only *Mr. D's* liability on the note; and after such explanation the said *E.* executed such release. The witness also proved, that after such note was given by *D.* to *E.* and such release executed, the said *E.* called and got several sums of money of *D.*, all of which were credited on said note.

Whereupon the defendant, by his counsel, prayed the opinion of the court, and their direction to the jury, as follows: 1. If the jury believe, that *Eliza Ann Kirk* had attained the age of sixteen years on the 15th day of July, 1824, and executed the release which has been given in evidence, with a full understanding of its effect and import, that then, this action cannot be maintained. 2d. That if the jury believe, that at the date of the appointment of *Owen Dorsey* as guardian, the said *Eliza Ann Kirk* had a natural guardian, that then the said court exceeded its jurisdiction in making the said appointment, and that the bond being void, this action cannot be maintained. 3d. That if the jury believe *Eliza Ann Kirk* is under the age of twenty-one years at this time, this action cannot be maintained. 4th. That if the jury believe *Owen Dorsey*,

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the person appointed guardian, was the same *Owen Dorsey* who acted as one of the judges of the Orphans Court named in the certificate of appointment of guardian, which has been given in evidence, that then, this action cannot be maintained. 5th. That if the jury believe that *Owen Dorsey*, after the 15th day of July, 1824, when *Eliza Ann Kirk* attained the age of sixteen years, offered to pay, and counted out to the said *Eliza Ann Kirk*, the sum of four or five hundred dollars, which she declined to receive, and afterwards took the note of *Owen Dorsey* in preference, as given in evidence, that such tendering and counting out the money, was an extinguishment of the claim which she, the said *Eliza Ann Kirk*, might have had, to the extent of such sum as the jury may believe was so tendered. But the court [ARCHER, Ch. J. and HANSON, A. J.] refused all and each of said prayers of defendant; and were of opinion that the plaintiff was entitled to recover, if the jury believe the testimony. The defendant excepted.

2. The plaintiff then prayed the court's direction to the jury, that upon the evidence in the first exception, the plaintiff is entitled to recover interest upon the balance decided to be due *Eliza Ann Kirk*, from the period the said balance became due, or at least from the commencement of this action. But the court being divided in opinion, refused to grant said direction, or to direct the jury that the plaintiff was entitled to recover any interest, but left the question of interest to the jury, to be by them decided. The plaintiff excepted. There was a verdict, and judgment for the plaintiff, and an appeal by both parties to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J., EARLE, and MARTIN, J.

R. B. Magruder for appellant, contended,

1. That the ward being of full age to receive her personal property, was of full age to do any act required or au-

thorised by law, to evidence, and acknowledge the receipt of her estate; and that the release executed by her, is a valid release. 1 *Thos. Co. Lit. (H)* 175. 170, note (28.) 163, note (a.) 1 *Blk. Com.* 463. *Act of 1798, ch. 101, sub-chap. 3, sec. 3. Act of 1715, ch. 39, sec. 13. Act 1798, ch. 101, sub-ch. 12, sec. 1, 15. 1809, ch. 168, sec. 1, 15. 1829, ch. 216, sec. 6, 7. 1 Thos. Co. Lit. 177. Davis vs. Jacquin, 5 Harr. and Johns. 109. Bowers vs. the State, 7 Ib. 35, 36.* 2. The Orphans Court had no power to appoint a guardian, and exceeded its jurisdiction in so doing, because the ward had a natural guardian, who should have been called on to bond, and this should have appeared on the proceedings. 1798, *ch. 101, sub-ch. 12, sects. 1, 2, 3, 20.* To shew that the objection could be made in this court, he cited *Bigely vs. Stearns, 19 Johns. Rep. 39. Spedden vs. State, 3 Harr. and Johns. 251, 252 and 276 (note.)* 3. That the ward being under the age of 21 years, at the trial of the cause below, and of course when the suit was brought, could not maintain the action. *Lowe and Gist, (note) 5 Harr. and Johns. 106. 1 Thos. Co. L. 175, (H) 172, (a.)* 4. That the appointment of *Owen Dorsey* as guardian, by two only of the judges of the Orphans Court, one of which judges was the said *Dorsey*, was invalid, and therefore the bond of the guardian was void. 1798, *ch. 101, sub-ch. 15, sec. 8.* 5. The payment or tender, of part of the money claimed by the plaintiff below, made by the guardian in the manner set forth in the evidence, was an extinguishment of the claim of the plaintiff, *pro tanto.* 2 *Kent. Com.—2 Eden's Cases, 72.* Upon the question of interest on the plaintiff's appeal, he referred to *Newson vs. Douglass, 7 Harr. and Johns. 453.*

Johnson for appellee, on the first point cited *Lowe vs. Gist. 5 Harr. and Johns. 106, note, (a.) Davis vs. Jacquin and Pomairat, Ib. 100. Bowers vs. State, 7 Ib. 32.* On the second and fourth point he referred to the *Acts of 1798, ch. 101, sub-ch. 12, sec. 1, 3. 1816, ch. 203, sec. 3.* He argued that by these acts, the Orphans Court, is empow-

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ered to inquire into the facts, upon which, the authority of appointing guardians is to be exercised. In this collateral way, the propriety of this exercise of power cannot be inquired into. *Raborg vs. Hammond*, 2 *Harr. and Gill*, 50. 3 *Bac. Abr.* 50, *Title Exors. and Admins.* But if this court, could in this way examine the question, the appointment would not be held void, unless it appeared *affirmatively* that the natural guardian had refused to renounce. *Barney vs. Patterson*, 6 *Harr. and Johns.* 182. *Taylor and McNeal vs. Phelps*, 1 *Harr. and Gill*, 492.

The only evidence of the appointment, which it was incumbent on the plaintiff to produce, was the bond, which could have been relied on as an estoppel, if the defendant had denied the appointment. *Dorsey* could not be allowed to say, that his appointment was invalid, because made by himself, nor can his securities make such a defence. In an action on a bond at law, a surety can make no defence, not open to his principal.

The *third* objection he insisted could not be maintained, as the *State* was the legal plaintiff; but at all events the objection should have been presented by a plea in abatement, which is the only mode, in which the infancy of a plaintiff can be taken advantage of. 2 *Saund.* 212, and note, 5. *James, et al. Lessee vs. Boyd*, 1 *Harr. and Gill*, 1. He argued that the release was void, and not voidable only, it being manifestly to the minor's prejudice. 2 *Kent. Com.* 190, 192. The note given by *Dorsey*, if good, merely secures to the ward his individual responsibility, and discharges his securities. *Bowers vs. State*, 7 *Harr. and Johns.* 36. *Kean vs. Boycott*, 2 *Hen. Black*, 511. If, however, the release was only *voidable*, it was competent to the minor to avoid it by suit, and she has done so. 2 *Kent. Com.* 194. But the circumstance of the contract being between guardian and ward, of itself renders it void. 5. The evidence in support of this prayer does not show a payment, there having been no receipt by the creditor. Nor was it a tender, not being of the whole sum. 2 *Saund. Plea. and*

Ev. 840. But if a tender, it does not go to bar the action, 3 *Taunt.* 95. *Harding vs. Spicer*, 1 *Camb.* 327. 2 *Saund. Plea. and Ev.* 836. *Karthauss vs. Owings*, 6 *Harr. and Johns.* 139. Upon the plaintiff's exception, he referred to *Newson's Adr. vs. Douglass*, 7 *Harr. and Johns.* 418.

BUCHANAN, Ch. J., delivered the opinion of the court.

The suit is by the *State* on a guardian's bond, for the use of a female ward, instituted after she attained the age of sixteen, but before she arrived at twenty-one, against one of the sureties in the bond. It is insisted on the part of the defendant below, *First*, That if *Eliza Ann Kirk*, for whose use the action was brought, had a natural guardian at the time of the appointment by the Orphans Court of *Baltimore* county, of *Owen Dorsey*, the principal in the bond as her guardian, the court exceeded its jurisdiction in making the appointment, that the bond is void, and the action cannot be maintained. *Secondly*, That if *Owen Dorsey*, the person appointed guardian, was at the time of making the appointment, sitting as a judge of the court, with only one other judge, the appointment was invalid, and the bond void. *Thirdly*, That supposing *Owen Dorsey* to have been regularly appointed guardian, if after *Eliza Ann Kirk* attained the age of sixteen years, he offered to pay, and counted out to her the sum of four or five hundred dollars, which she refused to receive, and afterwards took the note of *Dorsey* in preference, such offering and counting out the money, was an extinguishment of her claim, to the extent of the sum so offered and counted out. *Fourthly*, That if after *Eliza Ann Kirk* attained the age of sixteen years, she executed to *Dorsey* a release of all claims and demands, with a full understanding of its import and effect, the action cannot be maintained. *Fifthly*, That if she was under the age of twenty-one years at the time of instituting the action, it cannot be maintained; and evidence of the facts upon which these questions are raised, was offered to the jury, and is set out in the record.

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First then, suppose *Eliza Ann Kirk* had a natural guardian at the time of the appointment of *Owen Dorsey* as her guardian, were that appointment and the bond given in pursuance of it void, for want of jurisdiction in the Orphans Court?

By the *Act of 1798, ch. 101, sub-ch. 12, sec. 1*, the several Orphans Courts, had the power to appoint a guardian to an infant until the age of twenty-one years if a male, and until the age of sixteen years if a female, if such infant has no natural guardian, nor guardian appointed by last will. And by the *3d sect. of the same sub-ch. 12*, on the application of any friend of an infant, &c. to call on any natural guardian, or guardian appointed by last will, to give bond for the performance of his or her trust; and on failure or neglect of such guardian, to appoint another guardian. The distinction between an erroneous judgment by a tribunal having jurisdiction of the subject matter, and the judgment of a tribunal having no cognizance of the subject, is well known and acknowledged. If the mother of the infant in this case, who is claimed to have been her natural guardian, had asserted her rights as such, and taken upon herself the management and conduct of the infant's estate in the Orphans Court; or being called upon, had given bond for the performance of her trust, the Orphans Court, with a knowledge of the existence of such a guardian acting in pursuance of her trust, could not properly during the continuance of her authority, have appointed another guardian, and thereby have divested her of her rights. And as the rights, and authority, and power over the property and person of the infant, would be incompatible in two, such an appointment would have been void. If the natural guardian had assumed and entered upon her trust, and as such, taken upon herself the management of the estate of her ward in the Orphans Court, the appointment of *Owen Dorsey*, would have been an act not within the jurisdiction of that court, no more than would be the appointment of a second guardian, while the prior appoint

ment of another by the same court, was remaining in full force and unrevoked. Unless the natural guardian had failed or neglected to give bond for the performance of her trust, on being called upon to do so, in pursuance of the 3d section of the 12th sub-chap. of the *Act of 1798, ch. 101*, or had been removed for cause, under the provisions of the 12th section of the sub-chap. 15, it would not have been the case of an erroneous judgment by a court of competent jurisdiction, but the act of a tribunal having no cognizance of the subject, and therefore unauthorised and void, the Orphans Court having no power to create a guardian of its own appointment, in the case of an infant having a known, authorised, and qualified acting natural guardian. But though in relation to such a case, of a known, natural guardian asserting and exercising his rights, the Orphans Court is without jurisdiction; yet the appointment of a guardian, being a subject ordinarily cognizable in that court, and only excluded from its jurisdiction, by the circumstance of there being a natural guardian, or a guardian appointed by will, it does not follow, that the mere existence of a person ordinarily entitled to assume the office and trust of a natural guardian, is alone sufficient to divest it of its jurisdiction. That person, though known to the Orphans Court, may nevertheless reject or abandon the trust; in which event, a case in which a guardian may be appointed, a case within the jurisdiction of the court, is presented. That, may have been the case here; the mother of the infant, who might have assumed the office of natural guardian, may have rejected or abandoned the trust; or on being required to give bond for the performance of her trust, may have failed, or neglected to do it; and if so, in either case, the Orphans Court have the power to appoint another guardian. It does not indeed appear in this record, whether there was or not, such an abandonment of the trust, or failure or neglect by the natural guardian to give bond for the performance of it; but the Orphans Court having appointed another guardian, and there being nothing to show the absence of authority to

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do so, it is to be taken, that it acted within the sphere of its ordinary jurisdiction, and that what was done, was rightly done. And it not appearing to this court, to be the act of a tribunal, having no cognizance of the subject matter, it cannot be impeached here, coming thus incidentally in question.

And *secondly*, with respect to the appointment of *Owen Dorsey* as the guardian, he being present and sitting as one of the judges of the court, supposing it be so, yet being the act of a court of competent jurisdiction, whether that act was correct and regular, or not, still it was the judgment, the act of that court, the correctness or regularity of which, it is not for this court collaterally to inquire into. The question of jurisdiction, is a question that may be examined into, and the acts of a tribunal having no jurisdiction may be reviewed by another court; but the judgment of a court of competent jurisdiction is, as to all matters decided by it, conclusive, and cannot be afterwards questioned by any other tribunal, when coming in incidentally. This is a doctrine too well established to admit of being enlarged upon. Besides *Owen Dorsey* having given his bond, in which he is stated to be the guardian of *E. A. K.*, and having obtained possession of her property, it would not in a suit against him, have lain in his mouth to deny that he was guardian, in the very face of the recital in his bond, or to set up any supposed irregularity in obtaining the appointment; the recital in the bond being evidence as against him, that he was guardian. Nor does it lie in the mouth of his surety, against whom, the recital is equally evidence.

Thirdly, the offer by *Owen Dorsey* to pay to *E. A. K.* four or five hundred dollars, and counting out the money, cannot avail the party here as a tender, being an offer of only a part of the amount due, and a creditor not being under any obligation to accept less than the full amount; nor is it insisted upon as a tender. And if it was a tender, it could not, as such, operate as an extinguishment of the claim *pro tanto*. But it is contended, that it amounted to

and must be considered as a payment, to the extent of the sum so offered and counted out. But surely her express refusal to receive the part offered, and his agreeing to keep and pay interest upon the whole amount, could not constitute a payment, to the amount of the sum offered, and consequently was no extinguishment of any part of the claim.

Fourthly, by the *Act of 1798, ch. 101. sub-chap. 12, sec. 1 and 15*, power is given to the Orphans Court to appoint a guardian to an infant female, until she attains the age of sixteen or is married, when the guardianship ceases; and the ward or her husband, as the case may be, is entitled to receive from her guardian all her property. It has been decided by this court in *Davis vs. Jacquin & Pomarait*, 5 *Harr. and Johns.* 100, that although that act confers on an infant female a new capacity, the capacity to receive from her guardian the whole of her estate, it does not take away or destroy her state of legal minority, nor remove her other disabilities; but leaves them as they were before, except in relation to the disposition of her real estate, which she is empowered to do by will at the age of eighteen years. And the same principle is recognized in *Bowers' Adm'r vs. State use of Dryden*, 7 *Harr. and Johns.* 32. The legal infancy, therefore, of a female, not ceasing at the age of sixteen, *Eliza Ann Kirk*, not having attained the age twenty-one years, at the date of the release set up in this case, was, in reference to her capacity to execute such an instrument, in contemplation of law, a minor.

Some contracts made by infants are binding, such as contracts for necessities. Some are void, and others voidable only, such as contracts that may be for the benefit of the infant. But a contract that a court can see and pronounce to be to the prejudice of the infant, is void. And such, we think, is clearly the character of the instrument in question. It was executed on the ward's receiving from her guardian his promissory note, for the amount belonging to her in his hands; and being a release in the language of it, "of and from all and every action, suit, claim or demand, &c." if

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good, it discharged him and his sureties from all responsibility on his guardian's bond, a higher and a better security than his promissory note alone, and was therefore to the prejudice of the infant. But independent of the peculiar circumstances of this case, we think a female infant between the ages of sixteen and twenty-one, incapable of executing a valid release to her guardian; considering from the character of the relation subsisting between the parties, the state of ignorance in which an infant usually is in relation to the condition of her affairs, and the conduct of the guardian in the execution of his trust, and the inducements to a guardian who has abused his trust, to seek that shelter behind a release improperly obtained, which a mere receipt would not afford him, that such instruments are in their nature and tendency to the prejudice of infants, and opposed to sound policy.

Fifthly, it does not appear to us to be at all material, whether *Eliza Ann Kirk* was of the age of twenty-one or not, at the time of instituting the suit. She is not the legal plaintiff; the bond is to the *State*, the suit was brought in the name of the *State*, the legal plaintiff, and she is only the *cestui que use*; and it was not necessary for the purposes of the suit, to enter the use at all; though it is usually done in such cases, it might have been carried on as well without it, as with it. And being done, her non-age could not form the fit subject of a plea, the action not being brought in her name. We cannot distinguish this from the case of the *State vs. Dorsey* and others, *ante* 75. The same principle pervades both cases. We concur therefore with the court below on the first exception.

The question arising upon the exception taken on the part of the plaintiff below is, whether the plaintiff is entitled to interest on the balance found to be due to *Eliza Ann Kirk*, the *cestui que use*, and from what period? Which question the court below refused to decide, but left it to the jury to determine. The dealings between man and man are in their nature so various, that scarcely two cases occur

presenting the same aspect. The question of interest therefore, has been found to be one, not susceptible of the application to it, of any fixed and general rule, each case mainly depending upon its own peculiar circumstances.

This same question of interest, however, arose and was discussed in *Newson's Adm'r vs. Douglass*, 7 *Harr. and Johns*. 417, in which it was decided by this court, that the question was properly submitted to the jury by the court below, to be determined by them according to the equity and justice appearing between the parties, on a consideration of all the circumstances of that particular case, as disclosed at the trial. But it is there said, "there are indeed cases, not to speak of bonds, &c., in which interest is recoverable as of right—such as on a contract in writing to pay money on a day certain; as in the case of a bill of exchange or a promissory note; or on a contract for the payment of interest, or where the money claimed has actually been used," which in any aspect of this case would seem to be applicable to it. The guardian gave his bond for the performance of his duty as such, and by law it was his duty, on the arrival of the ward at the age of sixteen, to exhibit a final account to the Orphans Court, and to deliver to the ward all her property in his hands. Here was a contract, (so far as the property of the ward in his hands consisted of money,) to pay money when she attained the age of sixteen, which was a day sufficiently certain. The proof is, that when the ward had arrived at the age of sixteen, she called on the guardian for a settlement on a day appointed by him for that purpose; when he told her, that, "he had been disappointed in getting all the money, but had procured a part, which he offered to her;" that she declined taking it, preferring its remaining in his hands on interest, and that he agreed to keep the money on interest, and after paying her fifty or sixty dollars, gave her his promissory note for the balance due to her in his hands with interest. Here then is a case, in which the money was actually used; for he had so applied or disposed of it, that when

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called on for a settlement, he could only procure a part of it; it was not, therefore, lying by him unused. There was too, an express contract for the payment of interest, independent of the promissory note, which has a provision for the payment of interest, and is evidence of his keeping the money on those terms. The plaintiff is therefore, entitled to recover interest from that time, on the amount of the balance retained by the guardian in his hands. And the court below erred we think, in not having so directed the jury, and in leaving the question to be decided by them.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

JACOB MOATS vs. DANIEL WITMER.—*June, 1831.*

F sold a tract of land to W reserving the grain then in the ground. This was to be thrashed in the barn, and the straw left for W's use. While the grain was growing, F sold it to M, who had notice of the first agreement. M cut the grain and stacked it upon the farm, but afterwards entered upon the premises then in the possession of W, and hauled away the grain in the straw before it was thrashed, thrashed it; and did not return the straw. In an action of trespass *q. c. f.* brought by W against M—HELD, that if the jury believed M's entry was for the purpose of removing the grain and thrashing it off the premises, that it was a trespass *q. c. f.* and the plaintiff might recover damages for that, and the straw which was removed and not returned.

Where a party is a trespasser or not, according to the intention with which he enters upon land, then, whether he is a trespasser or not, is a question for the jury exclusively.

Acts which amount to trespass *vi et armis*, and which are a component part of one outrage, may be united with a claim for the trespass *q. c. f.* and damages for both recovered in the same action.

APPEAL from *Washington County Court.*

This was an action of *Trespass quare clausum fregit*, brought by the appellee, against the appellant, on the 5th of March, 1828.

The defendant pleaded not guilty, and issue was joined.

At the trial the plaintiff read in evidence to the jury, the following agreement, to wit: "Articles of agreement

made this 11th of November, 1826, between *Daniel Witmer* of the one part, and *Henry Funk* of the other part, witnesseth;—that the said *Henry Funk* excepts the grain in the ground, on the land conveyed by said *Henry Funk*, to *Daniel Witmer*, by a deed bearing date the 23d of October, 1826, last past. The straw to be left on the land, and thrashed in the barn of the said land, for *Daniel Witmer's* farm use," &c. And likewise read to the jury, the following conditions of sale, signed *Henry Funk*, and dated May 25th, 1827. "The condition of this present public sale is such, that the highest bidder or bidders shall be the buyer or buyers. The grain will be sold by the acre, and thrashed in the barn on the premises, and the straw left for the use of *Daniel Witmer*, and stacked in and round the barn of said *Witmer*. A credit of six months will be given the purchaser, by giving his note with approved security." Of which conditions of sale it was proved the defendant had notice. It was admitted that the plaintiff was in possession of the land, in the said agreement mentioned as purchased of *Funk*, and that the defendant in May, 1827, purchased the crop of grain in the ground from the said *Funk*, at public sale, when the aforesaid conditions of sale were read in the presence of the defendant, and that he cut the said grain and stacked it in the field where it grew. The plaintiff then proved, that the defendant afterwards entered on the premises, and hauled away to his own farm the grain in the straw, before it was thrashed, and there thrashed it, and did not return the straw to the premises. The defendant then prayed the court to direct the jury, that as he had a right of *ingress* and *egress*, to cut the grain, and get it out, and remove it, that the plaintiff is not entitled to recover in this action, on account of his removing the grain with the straw before it was thrashed; and *secondly*, if the court should be of opinion that the plaintiff is entitled to recover for the trespass, he is not entitled to recover for the straw removed, before it was thrashed. Which direction the court refused to give, but instructed the jury, that if the defendant enter-

ed on the premises for the purpose of removing the grain in the straw, and thrashing it off the premises, and did so remove, and thrash it, and did not return the straw to the premises, whereby it was lost to the plaintiff, that then, the plaintiff was entitled to recover for the trespass charged in the declaration.

The defendant excepted, and the verdict and judgment being against him, he appealed to this court.

The cause was argued before MARTIN, STEPHEN, and DORSEY, J.

Anderson, for the appellant, contended

1. That the defendant having a right to enter on the premises to get out his grain, was not guilty of the trespass complained of. On this point he cited, *Shafer vs. Smith*, 7 Harr. and Johns. 67. *Bul. N. P.* 89. 3 *Stark. Ev.* 1451. *The King vs. Commissioners of Dean Inclosure*, 2 Maul. and Selw. 79.

2. Supposing a trespass to have been committed, still the plaintiff was not entitled to recover damages in this action, for the straw was carried away before it was thrashed. 2 *Wheat. Selw.* 1035, 1036. 3 *Stark. Ev.* 1444.

Price for the appellee, referred to 3 *Stark. Ev.* 1444. *Dexter vs. Hager and Arnold*, 10 Johns. Rep. 256.

DORSEY, J., delivered the opinion of the court.

The direction given to the jury by the court below, was "that if the defendant entered on the premises, for the purpose of removing the grain in the straw and thrashing it off the premises, and did so remove and thrash it, and did not return the straw to the premises, whereby it was lost to the plaintiff, that then the plaintiff was entitled to recover for the trespass charged in the declaration." In this instruction, we can discover nothing of which the appellant ought to complain. It concedes to him more than he had any right to demand; and denies to him nothing on which he had a right to insist. 'Tis true that, under the contract be-

tween *Henry Funk* and *Daniel Witmer*, he was authorised to enter on the land for the purpose of cutting and securing the grain, thrashing it in the barn, and removing it away, but for no other purpose. The moment he entered, in the language of the court, "for the purpose of removing the grain in the straw, and thrashing it off the premises," his right of *ingress* and *egress* no longer protected him, and he stood in no better predicament than any other trespasser. Upon this ground the court were also right in refusing the first part of the instruction prayed for by the appellant; to wit: "that as the defendant had a right of *ingress* and *egress* to cut the grain, and get it out, and remove it, that the plaintiff is not entitled to recover in this action, on account of his removing the grain with the straw before it was thrashed." In granting this, they would have trenched upon the province of the jury in determining, *quo animo*, the defendant entered. If his entry was made for the purpose of getting out and removing the grain conformably to the agreement between *Funk* and *Witmer*, although after he entered he may have changed his mind and committed the outrage complained of, an action of *trespass quare clausum fregit* could not be maintained against him. It is the *intention* of the defendant which stamps the character of his entry, and this the jury, only, are competent to find. In granting this branch of the instruction too, we think that the County Court would have erred on another ground. Admitting the acts of the defendant as far as the land was concerned to be lawful, yet according to our construction of the articles of agreement between *Funk* and *Witmer*, the latter had such a property in the straw, as rendered him competent to maintain an action of trespass *vi et armis*, for such a taking and carrying away of the same, as is presented by the facts set forth in the bill of exceptions. The true intent and meaning of the agreement was, that the grain should be the property of *Funk*, the straw of *Witmer*: and their respective possessions were co-extensive with their rights. *Witmer's* right to the straw was absolute,

his possession unqualified, but as it might be lawfully invaded by *Funk*, or those claiming under him, with a view to its being thrashed in the barn on the premises. For this purpose, and no other, had they a right to touch or remove it. Suppose *Witmer*, owning both grain and straw, had sold the grain to one person, and the straw to another, (subject to the same restrictions as to thrashing out, as are prescribed in this case,) and a stranger were to seize and carry away both, can it be doubted, that against such wrong doer, each owner might maintain a separate action of trespass *vi et armis*? In the case at bar the principle is the same.

The second branch of the defendant's prayer, "that if the court should be of opinion, that the plaintiff is entitled to recover for the trespass, he is not entitled to recover for the straw removed before it was thrashed," is put to rest, by the interpretation we have given to the contract between *Funk* and *Witmer*. As whatever may be the law, as to a plaintiff's right to recover substantive damages for acts of the defendant not amounting to a trespass *vi et armis*, but which may be the foundation of a separate action on the case, when charged in the declaration in trespass *quare clausum fregit*, as a component part of the outrage complained of, there cannot be a doubt, that if such acts do amount to a trespass *vi et armis*, they may be united with the action of trespass *quare clausum fregit*, and the same damages be recovered therefor, as if a separate action had been brought. And the plaintiff is entitled to a full indemnity for both or either of the trespasses accordingly, as his case may be sustained by proof. 3, *Stark. Ev.* 1451, 2 and 3, and the cases there referred to. 5 *B. and A.* 220.

Seeing no error in the proceedings of the County Court, to which the appellant has any right to except, we affirm their judgment.

JUDGMENT AFFIRMED.

STOCKETT vs. ELLICOTT.—*June, 1831.*

Upon a plea of usury to an action upon a single bill, it appeared that the bill had been given upon a settlement of an account, which contained items of debt and interest. In two of the items, the interest as calculated, exceeded 6 per cent. The receipt for the bill, at the foot of the account, stated, that in "case of error either way, should any be discovered," it should be corrected. HELD, that this was no evidence of an usurious agreement.

Every case of usury must depend upon its own circumstances. It is the intention, and not the words used, that gives character to the transaction; and that intention, when it can be reached, must govern. Where the real truth and substance is ascertained to be a loan of money, a lending on one side, and a borrowing on the other, at a rate of interest exceeding six *per centum*, the form given to the transaction is not material; no shift or device can take it out of the Act of Assembly.

APPEAL from *Anne Arundel* County Court.

This was an action of *Debt* commenced on the 13th of January, 1825, by the appellees, *George Ellicott*, and others, as surviving partners of *John Ellicott*, of *John*, against the appellant, *Richard G. Stockett*, on the following single bill: "I promise to pay unto *Ellicott and Co.*, in one, two and three equal annual instalments, the sum of £594 3s. 9d. with interest from the date hereof, for value received, as witness my hand and seal, this 28th day of July, 1815."

The defendant pleaded usury, and payment, to which there were issues.

At the trial, the defendant in support of his plea of usury, read in evidence the account stated between the parties, and the receipt put thereon at the time of settlement, and for the balance of which the above single bill was given; and to show that in said account the plaintiffs had estimated and charged more interest than would have been allowed upon the principal sums, for the times for which credit was given, at the rate of six *per cent. per annum*, specified the charge in said account of £25 14s. 7d. as and for interest upon the principal sum of £509 1s. 1d. for the space of eight years, one month and five days; and also the charge £9 14s. 4d. as and for interest upon a principal of £41 18s. 2½d.

for the space of three years, ten months and one day ; and insisted that thereby the said defendant was charged with interest above the rate of interest allowed by law, and that the same was evidence of usury.

At the foot of the account so read in evidence by the defendant, there was the following receipt, signed by the plaintiff: " July 28th, 1815—Received his note in full for the above account, it being understood, in case of error either way, should any be discovered, that it shall be corrected."

The plaintiffs then prayed the court to instruct the jury, that there was not sufficient evidence of usury in the transactions between the parties, which instruction the court (KILGOUR and WILKINSON, A. J.) gave. The defendant excepted ; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, STEPHEN, and ARCHER, J.

A. C. Magruder, and *Alexander*, for the appellant, contended,

1. That the evidence offered did prove usury.

Tyson vs. Rickard, 3 *Harr. and Johns*. 109—2 *Strange*, 1246.

2. That the question of usury ought to have been left to the jury.

Johnson, for the appellees.

The account, which was the only evidence offered in support of the plea of usury, was admitted, with the receipt, providing for the correction of errors, which the court decided was not evidence of a corrupt agreement to charge usurious interest—this was the only point decided by the court. The receipt shows clearly, that nothing corrupt was intended. All the principal sums are admitted by the plea to be due, and therefore, the whole office of the re-

ceipt, was to guard against errors in the calculations of interest.

As this defence involves a forfeiture to the plaintiffs, the defendant was bound to adduce the same evidence, as if he was prosecuting for the penalty.

BUCHANAN, Ch. J., delivered the opinion of the court.

This is an action upon a single bill, the defence relied upon was usury, and the case is brought up on an exception taken at the trial, to an instruction by the court to the jury, "that there was not sufficient evidence of usury in the transaction between the parties."

Every case of usury must depend upon its own circumstances. It is the intention, and not the words used, that gives character to the transaction, and that intention when it can be reached, must govern. Where the real truth and substance is ascertained to be a loan of money, a lending on one side, and a borrowing on the other, at a rate of interest exceeding six *per cent. per annum*, the form given to the transaction is not material; no shift, or device, can take it out of the Act of Assembly. Here the bill in question was given for the amount of an account rendered against the appellant, in which interest was charged upon the different items. Every item of principal charged in the account, is admitted; but it is said, that the interest charged on different items of principal, exceeded the rate of six *per cent.* a year, and therefore, that the bill being given for the whole amount, including the interest so charged, it was an usurious transaction.

Whatever might have been the case, if it had appeared that the alleged over charges of interest were, by agreement of the parties, made and allowed, in consideration of forbearance, and giving day of payment to the appellant, of the several principal sums of money due from him, on which such charges of interest were made, there is in this record no evidence, express or implied, of any such agreement or intention, or tending to show, or prove any such

agreement or intention, without which there could have been no usury. The agreement, the intention of the parties, constituting a principal ingredient of usury.

But it is contended, that whether it was an usurious contract or not, was a question which ought to have been left to the jury, and that the court did wrong in instructing them, “that there was no sufficient evidence of usury.” If there had been any evidence tending to prove an usurious contract, it should properly have been left to the jury; but there was no such evidence, and surely in the absence of any evidence tending even to prove it, the court cannot have erred in instructing the jury, “that there was not sufficient evidence of usury.” So far from there being any evidence tending to prove usury, or from which the jury could have inferred an usurious agreement, the evidence set out in the record tends to a different conclusion.

The only evidence in the case is, the single bill, the account for the amount of which it was given, and a receipt on the back of the account by the obligee, for the bill in full of the account, of the same date with the bill; which receipt contains a stipulation, “that in case of error either way, should any be discovered, it shall be corrected.” That receipt, if it tends to prove any thing, it is, that there was perfect fairness in the transaction; it seems to presuppose that there might possibly be mistakes in the charges, either of items of principal, or of interest, and provides for the correction of them, if they should be made to appear, and thus tends to show that there was not any usurious intention or agreement, rather than that there was. For can it be, that if there were known charges of interest exceeding the legal rates, intended and agreed upon between the parties, as a consideration for forbearance, and time given to the appellant for payment of the several sums of principal charged in the account, the obligee would at the same time, have armed the appellant with a stipulation for the correction of those very over charges, the price of forbearance!

The evidence goes to negative the allegation of usury, and no other inference can be drawn from it.

The court therefore, we think, did right in giving the instruction complained of. It was the least it could do, to tell the jury there was not sufficient evidence of usury, when there was no evidence at all.

JUDGMENT AFFIRMED.

SAMUEL HAMILTON vs. SAMUEL A. JONES.—*June, 1831.*

E, tenant for life, permitted H to cut a ditch through her land, to supply his mill with water. Upon the death of E, a verbal agreement was made between the remainder-man and H, for the purchase of the ditch, and the amount of the purchase money was to be ascertained by certain arbitrators. An award being made, H filed his bill for a performance of this agreement. The defendant's answer admitted the facts, but relied upon the statute of frauds as a bar—HELD, there was no part performance, and the contract could not be enforced.

The ground upon which Chancery interposes its aid, in the case of a clear part performance of a verbal agreement, is, that to withhold relief, would be to suffer a party, seeking to shelter himself under the statute of frauds, himself to commit a fraud.

APPEAL from the Equity side of *Prince George's County Court*.

The bill which was filed on the 28th of December, 1825, stated, that some time in the year 1817, the complainant (the present appellant,) purchased a mill-seat and mill, on a water course called "*Piney Branch*," being part of a tract of land called the "*Resurvey on part of Isaac's Park*," containing two acres; that for the purpose of conveying water to his mill, with greater convenience and effect, he shortly after his aforesaid purchase, by the leave, and with the consent of a certain *Elizabeth Jones*, cut a ditch of about 100 or 120 yards in length, through a small angle, or corner of a tract of land called the "*Wintersols Range*," at that time in the possession of the said *Elizabeth Jones*, who was tenant thereof for life, under the will of her deceased husband, *Richard S. Jones*, and has continu-

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ally since, quietly used, and enjoyed the benefit of the said water course, by means of the said ditch, until some time in October last, when a certain *Samuel A. Jones*, (the appellee,) to whom the land called "*Wintersol's Range*," had descended, upon the death of his mother the said *Elizabeth Jones*, which occurred some time in the preceding month of July, informed the complainant, that he conceived his land was injured by said ditch, and that some compensation must be made him therefor, which the complainant being perfectly willing to do, to any reasonable or just amount, assented; but they being themselves unable to agree upon what should be the amount of the compensation, it was agreed to leave the matter to the arbitration of two persons, one to be chosen by each party, with power to the arbitrators, in case of disagreement, to call in a third person as umpire; the defendant, the said *Jones*, promising upon the payment by the complainant to him, of the sum so to be ascertained to secure to the complainant and his heirs, the right to convey water to his mill in the manner aforesaid, by a legal, and valid instrument of writing. That the arbitrators not being able to agree upon the sum to be paid by the complainant, in pursuance of the authority given them for that purpose, called in an umpire, who determined, as complainant is informed, that ninety dollars was an adequate compensation for any damage, or injury which the defendant had, or might sustain by reason of said ditch, which sum, and ten dollars more, the complainant has already offered, and is still willing to pay the defendant, who refuses to receive the same, and threatens to destroy said ditch, and divert the water from complainant's mill, unless he will pay a much larger sum. *Prayer* for an injunction and a general relief, &c.

The County Court granted an injunction accordingly, until further order.

The *answer* of the defendant admitted the purchase by the complainant, of the mill seat, &c., as stated in his bill, and that he did with the leave, and permission of defendant's

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mother, *Elizabeth Jones*, convey water to the same in the manner he has charged, through a part of a tract of land called "*Wintersol's Range*," in which the said *Elizabeth* had a life estate, under her husband's will; the defendant, under the same will, was entitled to a fee in remainder therein, after the death of the said *Elizabeth*. The defendant admitted, that upon the death of said *Elizabeth*, which occurred some time in the fall of 1825, he took possession of said land, and supposing himself to be prejudiced by the said ditch, he informed complainant, that he must make him compensation, and unless he did so, he should be compelled to obstruct the passage of the water. He admitted the reference to arbitration as stated, and the calling in of the umpire, who, he has been informed and believes, declared, that the injury done defendant, was fully equal to \$120, but that he afterwards determined upon making an award upon principles, which defendant does not consider to be correct. The answer then asserts that the agreement set up in the bill, being in relation to an interest in land, and not being in writing, is void under the provisions of the statute of frauds, which is pleaded, and relied on as a defence to the relief prayed.

The cause was set down for hearing on bill, and answer, and the County Court at July term, 1829, dissolved the injunction, and dismissed the bill with costs.

From this decree, the complainant appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, ARCHER, and DORSEY, J.

By *A. C. Magruder*, for the appellant, who contended,

1. That the defendant is bound by the agreement which it is admitted by him, he made.—1 *Madd. Ch. Pr.* 293. *Ib.* 301. 2. That if the award is valid, the defendant is bound by it—if for any reason it could be set aside, still the injunction ought to have been continued, and the case retained

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in order to ascertain to what compensation the defendant was entitled. 3. The injunction was in part, to prevent the defendant from diverting the water from complainant's mill; if he had a right to change the direction of the water from its then course, he could only return it to its original course.

Johnson, for the appellee.

There has been no part performance of the agreement between complainant and defendant. The performance was of the prior contract with the tenant for life; the contract set up in the bill, is, that the defendant should convey to complainant, a right in fee to the ditch. The answer only admits, that upon certain terms, complainant might use the ditch, and the case being set down upon bill and answer, the allegations of the answer, are all to be taken as true. But the agreement, whatever may be its terms, relating to an interest in land, is within the statute of frauds, and not being in writing is void. *Hays vs. Richardson*, 1 *Gill and Johns*. 382. *Heulins vs. Shippam*, 5 *Barn. and Cres.* 221. The agreement to refer to arbitration is of the same character, and therefore does not take the case out of the statute. *Cooth vs. Jackson*, 6 *Ves. Jr.* 17.

There has been no acquiescence on the part of the defendant, to preclude his availing himself of the statute. The answer shows, that the moment his title accrued, he informed complainant, that the ditch must be obstructed, or compensation made. Nothing done prior to the agreement can avoid the statute.—*Boardman vs. Mostyn*, 6 *Ves. Jr.* 470. 1 *Madd. Ch. Pr.* 301. The continuance of a possession previously acquired is no part performance. *Wills vs. Stradling*, 3 *Ves.* 378. *Buckmaster vs. Harrop*, 13 *Ib.* 474. *Philips vs. Thompson*, 1 *Johns. Ch. C.* 149. *Jer. Eq.* 437. As there are no acts of part performance alleged in the bill, the answer could not deny them—a plea of the statute would of itself have been sufficient. The complainant was not entitled to a modified injunction, because he does not allege, that the natural course of the

stream would be changed by obstructing the ditch; but if the bill had alleged it, as the case is set down on the bill and answer, there must be some such admission in the answer, or it will not avail him.

BUCHANAN, Ch. J., delivered the opinion of the court.

We can discover nothing in the record, to warrant a decree for the relief sought in the bill. The ditch, for the preservation of which, the aid of Chancery is invoked, was made by the permission of a tenant for life, then in possession, through the land of the defendant, the remainder-man, without (for any thing that appears) his sanction or authority. The ditch, moreover, was exclusively for the convenience and benefit of the complainant, and the assent of the tenant for life to the making of it, appears to have been given without consideration. It was a mere naked license to the complainant, for his exclusive accommodation, voluntarily given by the tenant for life. The tenant for life, died in July, 1825, and in October of the same year, the remainder-man who had then taken possession, informed the complainant, that his land was injured by the ditch, and that he must make him some compensation, or he would be obliged to obstruct it. There was no acquiescence therefore, by the defendant, in what had been done prejudicial to the complainant, or affording him any ground of complaint; or of a character to give him any standing in a Court of Equity. At most, it was but an acquiescence for a month or two, in the enjoyment by the complainant, of an easement over the defendant's land, for the exclusive accommodation of the complainant, and to the prejudice of the defendant, and is wholly unlike the case of a remainder-man, who continues to receive the rent, and lies by, and with notice, suffers the lessee to rebuild, &c. to the improvement of the estate, and to the injury of the lessee, if evicted. The ground upon which Chancery interposes its aid, in the case of a clear part performance of a verbal agreement, is, that to withhold relief, would be to suffer a party seeking

to shelter himself under the statute of frauds, himself to commit fraud. But what fraud was there here, in merely suffering the complainant to enjoy an easement erected for his own benefit, on the land of the defendant, and to his prejudice, and that too, without any consideration? With respect to the alleged agreement by the defendant, to secure to the complainant and his heirs, the privilege of conveying the water to his mill through the ditch, on his paying to him as a consideration therefor, such sum as should be adjudged by arbitrators appointed by them, it is admitted by the answer; but it was a verbal agreement, and the statute of frauds is insisted upon, and nothing has been done to entitle the complainant to a decree for a specific performance.

The ditch was not made in pursuance, or upon the faith of that agreement, but was dug long before, by the permission of the tenant for life, without the sanction of the defendant, who had not then come into the possession of the land. It was not an improvement by which the value of the land was advanced, but directly the reverse, and the defendant has derived no benefit or advantage from it. The complainant has paid no money upon the agreement, nor been put to any costs or expense in consequence of, or upon the faith of it. There has been no part performance, nor any act done by him in part execution of it, from which he could suffer an injury, by the refusal of the defendant to execute it on his part. All he did, the making of the ditch, was done before the agreement, and not resulting from it. It was in reference to what had been already done, that the agreement was entered into, and what he had to do, to entitle himself to the beneficial enjoyment of it, was the payment of the sum determined on by the umpire as a sufficient consideration, which he might have declined doing, if he had seen fit; and the refusal by the defendant to accept it and fulfil his engagement, gives him no ground to stand upon, in the face of the statute of frauds.

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It is the mere case of a verbal agreement within the statute of frauds in relation to an interest in land, which the defendant refuses to fulfil, relying upon the statute; without any part performance by the complainant or other act done, for his claim to the interposition of Chancery to lean upon. The leaving of it to others to say, what would be a sufficient consideration for the privilege of continuing to convey the water by means of the ditch, through the defendant's land, does not distinguish it from any other verbal agreement; and the circumstance alone, that the umpire determined on a sum, that he supposed would be a sufficient consideration, cannot have the effect to take it out of the statute; and notwithstanding the defendant in his answer, admits the agreement, yet as he insists on the statute, he is entitled to the benefit of it.

DECREE AFFIRMED.

HUNGERFORD vs. BOURNE.—*June, 1831.*

Upon a bill against an alleged intruder for an account of the rents and profits of the complainant's estate, accruing during her minority, her guardian is not a competent witness to prove an agreement between himself and the defendant, that the defendant should keep the estate, and pay the rents to the complainant and her sister, who were jointly interested. It was the duty of the witness to have collected the rents, and accounted for them. He is therefore interested in sustaining the suit.

The objection to the competency of a witness, by whose proof, a mere interlocutory order, not the subject of an appeal, was obtained, is open to consideration in the Appellate Court, though more than nine months had elapsed, between the passage of the interlocutory order, and the time of taking the appeal from the final decree.

APPEAL from the Court of Chancery.

The bill in this case was filed by the appellee, *Dorcas G. Bourne*, against the appellant, *William E. Hungerford*, on the 21st of December, 1819.

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The following statement of the case and the proceedings in Chancery, is extracted from the opinion of the judge, who pronounced the judgment of this court.

The bill states, that in the year 1807, a certain *Thomas Bourne* died, seized and intestate of certain lands, one-half of which came by inheritance to the complainant; and that during her minority, the appellant took possession of it, and either rented it to others, or cultivated it himself, under an agreement with a certain *James M. Taylor*, her uncle, with whom she lived, to pay therefor per annum, 4150 pounds of tobacco. The suit was instituted after she came of age; and with the bill, an account is exhibited of the alleged stipulated rent; the balance appearing on which, with interest on each year's rent, from the time it is supposed to have become due, is stated to be the quantity of tobacco claimed, with a prayer for an account of rents and profits, and for general relief.

The appellant in his answer, admits the title of the complainant to one-half of the land; but among other things denies, that he ever agreed with *James M. Taylor*, or any other person, to rent the land, or any part of it, at any price, or on any condition, or to pay the rent mentioned in the bill, or that he owes any part of the tobacco mentioned in the account exhibited with the bill, or that he ever took possession of, and cultivated the land himself, or rented it out to others, as charged in the bill; but admits, that on the death of *Thomas Bourne*, from whom the estate descended, he did enter upon the land as administrator, to finish the growing crop, and to receive from the tenants, the rents then due; and that he did at the particular request of his mother, who was entitled to one-half of the land, and of *James M. Taylor*, the relative and acting friend of the complainant, agree to rent out a parcel of the land for one year, with the express understanding that he was not in any way to be responsible for the rents, if the tenants should fail to pay. After testimony taken on both sides, among which was that of *James M. Taylor*, which was objected to on the ground

of interest, the Chancellor being of opinion that it was competent, and upon the whole of the evidence, considering the appellant an intruder upon the estate of the complainant, on the 26th of July, 1827, decreed an account to be taken of the rents and profits, on the principle, that whoever enters upon the estate of an infant, is considered in equity, as entering as guardian to such infant, and may be made to account for the rents and profits.

The account reported by the auditor, was excepted to among other things, on the ground, that it was in part founded upon the testimony of *James M. Taylor*, who was alleged to be an incompetent witness. And on the 16th of February, 1829, the Chancellor overruled the exceptions to the report, and decreed that the appellant should pay to the complainant, the amount stated to be due, or bring the same into court, to be paid to her. From which decree this appeal was made.

The cause came on to be argued before BUCHANAN, Ch. J., and EARLE, MARTIN, ARCHER, and DORSEY, J.

Boyle, for the appellant, contended,

1. If this suit can be supported in Chancery in the name of the complainant, it should have been against *James M. Taylor*, her guardian. *Act of 1829, ch. 24, sec. 8.* 1798, *ch. 101, sub-ch. 12, sec. 4, 5, and 8.* 2. An action of debt at common law, on the guardian's bond, might have been sustained, and where there is a remedy at law, Chancery will not interpose, except upon peculiar grounds. *Drury vs. Conner*, 1 *Harr. and Gill*, 229. 3. Where land has been rented out by a guardian, the ward, when of age, cannot maintain an action against the lessee, but the rents and profits must be accounted for by the guardian. *Truss vs. Old*, 6 *Randolph*, 556. 2 *Kent. Com.* 185, (5) 186, 187. 4. A bill to account in a case of this sort will not lie; it is brought by a ward after arriving at age, against a lessee (to whom the guardian is alleged to have rented the estate)

for the purpose of making such lessee account for the rents and profits, said to have accrued during the minority. 1 *Rol. Abr.* 121. 1 *Com. Dig. Acc. E.* 4, 189. To sustain a bill for an account, there must be mutual demands. *Dinwiddie vs. Bailey*, 6 *Ves.* 141. *Porter vs. Spencer*, 2 *Johns. Ch. Cases*, 169. *Smith vs. Marks*, 2 *Randolph*, 449. This court will not decree an account for rents, merely because they are due at law, but will do so, where a discovery is requisite to its being taken. 2 *Atk.* 282. 3 *Ib.* 124. Where there is a clear right to rent, but no remedy at law, as no *demesne* lands on which to distrain, equity will give relief. 1 *Ves. Sr.* 171. 5. If the defendant rented the land, he is not answerable as a bailiff. No person being answerable as such, for rents to an infant, except an intruder. *Newburgh vs. Bickerstaff*, 1 *Vernon*, 295. *Cary vs. Bertie, et al.* 2 *Ib.* 342. 6. *James M. Taylor* is not a competent witness; he is guardian to the infant complainant, and as such, has a direct interest in the event of the suit. *Doe vs. Williams*, *Cowp.* 621. *Forrester vs. Pegon*, 1 *M. and S.* 9. The objection to his competency does not come too late. *Harwood vs. Harwood*, 1806, *per Kilty*, *Ch.* *Johnson vs. Berry*, *per Kilty*, *Ch.* 1810. *Winder, et al. vs. Diffenderfer*, *per Bland*, *Ch.* 1830. *Strike vs. McDonald*, 2 *Harr. and Gill*, 240.

Magruder and Brewer, Jr. for the appellee.

There is nothing to show that *James M. Taylor* was guardian to complainant, at the time the land was leased to the appellant. The answer expressly denies, that defendant had any communication on the subject of renting the land, from the guardian *Taylor*, or even made a contract to that effect with him, or was responsible to him for the same.

1. The decree to account was conclusive upon the rights of the parties, and having been passed two years before the appeal, cannot now be reviewed. *McDonald vs. Strike*, 2 *Harr. and Gill*, 259. A decree to account, unless merely subsidiary to something else, must be appealed from within

the nine months. *Snowden vs. Dorsey*, 6 *Harr. and Johns*. 114. *Hagthorp vs. Hook*, 1 *Gill and Johns*. 309. In these cases, the account was only incidental to the relief asked, and not, as in this case, the *gist* of the action. The decree here to account, contains no reservation of the equities of the parties, as there would have been, if the Chancellor did not intend to settle their rights. There can be no doubt that rights of parties may be settled by decrees to account. 2 *Madd. Ch. Pr.* 347, 348. The appeal was taken from the final decree, and not the decree to account.

2. The defendant, in his answer, does not resist complainant's right to recover, on the ground of a responsibility to any one else, but because he had received no money. It appears that the defendant was in possession prior to the guardianship, and continued in possession after its termination. If defendant is to be excused on the ground that he contracted with complainant's guardian, he ought to show the authority at the date of the contract. But suppose he did contract with the guardian, now that the guardianship is determined, the ward may recover. The guardian cannot recover after the ward arrives at age, and therefore if the ward cannot recover, no one can. 2 *Fonb. Eq.* 234. *Conner vs. Drury*, 1 *Harr. and Gill*, 230. 3. An action at law could not have been maintained for these rents and profits against the present defendant; but if it could, the objection to the jurisdiction comes too late; it should have been taken by a demurrer to the bill. *Drury vs. Conner*, 1 *Harr. and Gill*, 230. *Gibbs vs. Clagett*, 2 *Gill and Johns*. 14. *Underhill vs. Van Courtlandt*, 2 *Johns. Ch. C.* 369. *Ludlow vs. Simond*, 2 *Caine's Cases in Error*, 38, 40, 52. *Livingston vs. Livingston*, 4 *Johns. Ch. C.* 290. 1 *Eden's Rep.* 190. *Taylor* is a competent witness. The decree in this case could not be used in evidence against him, even if it was shown, that he would be liable to complainant in the event of her failing in this case, which however, has not been done.

Taney, (Attorney General,) in reply.

1. The bill states a clear case for the interposition of a Court of Chancery, and consequently, it could not be demurred to; but the want of jurisdiction appears by the denial of its statements in the answer. The defence could only be set up in this way. It is because the complainant has not proved her case, that she is not entitled to relief, and not because the bill does not contain the necessary averments. 2. From the decree to account there could have been no appeal. *Dorsey vs. Smith*, 6 *Harr. and Johns*. 262. *Thompson vs. McKim*, 6 *Harr. and Johns*. 302. *Hagthorp vs. Hook*, 1 *Gill and Johns*. 307. The reasoning of the Chancellor which precedes the decree to account, forms no part of the decree. It merely indicates his then opinion, which he might afterwards take back. 3. But supposing complainant to be in the proper court, and the defendant liable if he received rents, is there any evidence to charge him? The evidence shows that *Mrs. Hungerford* was entitled to occupy the land the first year, after the death of *Thomas Bourne*, and after that, the appellant, as a matter of kindness, undertook to rent it, and receive the rents for *Taylor*, stipulating however, that he would not be responsible beyond his actual receipts. Reject the evidence of *Taylor*, and there is no proof in support of the account. He is the only person who speaks of rents received by *Hungerford*, and there is no pretence that he occupied the lands himself. *Taylor* is an incompetent witness upon the ground of interest. It was his duty to have collected these rents, and his bond as guardian, is responsible for them, or the annual value of the land. By establishing the claim against the present defendant, he discharges himself. If *Hungerford* entered upon the land at all, it was in virtue of an authority from *Taylor*, the guardian, and therefore he cannot be made to account to the ward. He could not, under those circumstances, be presumed to have entered as guardian. But suppose he entered wrongfully; if his entry, and possession afterwards, were ratified by the guardian, he cannot in that case, be an-

swerable for rents as guardian, upon the ground that he entered as an intruder. It is not material whether he has paid or not; if any thing is now due, it must be paid to *Taylor*, with whom the contract was made. But the bill does not charge a non-payment to *Taylor*, and complainant cannot recover by proving such a case.

BUCHANAN, Ch. J., delivered the opinion of the court.

After adverting to the statement of the case before set forth, the Judge proceeded:

As the case is presented to us, we do not feel ourselves authorised to consider the appellant as an intruder upon the lands of the complainant, and to treat him as her guardian, and as such, answerable to her for the rents and profits of the estate. *James M. Taylor* swears that *Thomas Bourne*, from whom the estate descended, died in the spring or summer of the year 1807, that the complainant, whose business he transacted, lived at that time with him, that some time after the death of *Thomas Bourne*, either the succeeding fall, or spring, or summer, he is not certain which, the appellant proposed to keep the whole of the lands of the late *Thomas Bourne*, and to pay one-half of the rents, (to be ascertained by persons chosen for that purpose,) to the complainant, and her sister who was then living and entitled to a part of the land, (the appellant's mother being entitled to the other half) to which he, *Taylor*, who is stated in the bill to be the uncle of the complainant, and with whom she at the time lived, agreed.

If looking to this testimony, and treating *Taylor* as a competent witness, it should be held, that such a letting by an uncle and friend of the complainant entitled to be her guardian, and with whom she lived, and who was in the habit of transacting her business, was, if he had not then been appointed guardian, unauthorised, and that the entering upon, and holding the land by the appellant under such an agreement, constituted him an intruder, and subject to be made answerable in equity, for the rents and profits as a guar-

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dian; yet seeing from other evidence in the cause, that *Taylor* was appointed guardian to the complainant, and filed his bond as such, in the *Calvert* county Orphans Court on the 8th of August, 1808, may it not be inferred in the absence of any thing to the contrary, that the agreement with the complainant, of which he speaks, was made after he was appointed guardian, and when he was clearly authorised to rent out the land? This would be perfectly consistent with that part of his testimony, in which he says that it was made in the fall, or spring, or summer, he is not certain which, next succeeding the death of *Thomas Bourne*, which was in the spring or summer of 1807. For if it was made at any time during the month of August, 1808, after the 8th, it was in the summer, and within the words of his testimony. Besides, he may have been appointed guardian some time before he gave his bond, (for the time of his appointment does not appear in the record,) and it is more reasonable to suppose, that he made the agreement after he was appointed guardian, and when he was authorised to make it, than before, and when he was not authorised, there being nothing in his evidence confining the agreement to a prior time, or leading to a different conclusion. Or, if it was made before *Taylor* received the appointment of guardian, yet as he was appointed long before any rents became due, and as it appears that he, from that time, received a portion of the rents for each year, up to the year 1814, for which credits are given in the exhibit filed with the bill, and in the report of the auditor, it would seem to follow, that he accepted the appellant as his tenant in the capacity of guardian, and received the rents in that character; and that, from the time of his appointment, the relation in which the appellant stood to him, was that of his tenant, as the guardian of the complainant. In either case, the appellant was in by authority; in the first, from the time of the original agreement; and in the latter, from the time that *Taylor* was appointed guardian, when a new relation commenced, and when no rents and profits had been received,

and is not to be treated as an intruder, nor liable to be called on as guardian, to account for the rents and profits. Nor answerable to the complainant on his contract with *Taylor*, to whom alone he is responsible; and if *Taylor* has violated his duty, or malconducted himself as guardian, her remedy is against him on his guardian's bond. But leaving this view of the subject, and looking to the other evidence in the record, it seems to us, that the testimony of *Taylor* cannot stand with that of several of the other witnesses, particularly that of *James Wilson* and *Samuel Turner*, with which it is wholly inconsistent; and taking the whole of the evidence together, we think the weight of testimony is against the complainant, and that the appellant did not take possession of the land, and either rent it out to others, or cultivate it himself, under an agreement with *Taylor*, to pay a stipulated rent as charged in the bill; nor at any time enter upon it, and occupy and enjoy it, or receive the rents and profits to his own use, so as to charge him as guardian, and that he had no other concern with it, than as the agent of *James M. Taylor* and his mother, for which we think he should not be made to account for the rents and profits. *Drury vs. Conner*, 1 *Harr. and Gill*, 220.

But if it was otherwise, and taking the whole of the evidence together, it would be sufficient to subject him to an account for the rents and profits, yet without the testimony of *Taylor* there is nothing to charge the appellant, and we think it was incompetent and ought to have been rejected. He was the guardian of the complainant. It was his duty to collect the rents and account for them, and if he received and misapplied them, or they were lost, by any culpable negligence or inattention to his duty, he is answerable on his bond to the complainant, and is therefore interested in sustaining this suit, and thereby exonerating himself from liability. But it is said that this objection comes too late, and that the appellant, to avail himself of it, should have appealed from the interlocutory decree of the 26th of July, 1827, (by which the rights of the parties are supposed to

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have been settled,) within nine months from the time it was passed, the time prescribed by the act of 1785, *ch. 72, sec. 27*; whereas this appeal, which is from the final decree of the Chancellor, was taken on the 3d of June, 1829, almost two years after the date of the interlocutory decree. But to this we cannot yield our assent; the rights of the parties were not finally adjudicated by the interlocutory decree of the 26th July, 1827. It is true the Chancellor does say, that he “considers all the testimony in the case competent, and so far credible when taken altogether, as to entitle the plaintiff to recover.” But that is not a decree finally settling any thing in controversy between the parties; but an expression only of the opinion of the Chancellor, upon which the decree for an account was founded. And the account when taken, might have been rejected by the Chancellor on further proof on more full consideration. The decree, therefore, directing an account to be taken, was a mere interlocutory order, from which an appeal could not properly have been taken. *Snowden and others vs. Dorsey and others*, 6 *Harr. and Johns.* 114—and *Hagthorp and wife and others vs. Hook's adm'rs*, 1 *Gill and Johns.* 270, are conclusive on this point, and as an appeal would not lie from the decree for an account, the whole case is open upon the appeal from the final decree.

DECREE REVERSED AND BILL DISMISSED

WITH COSTS IN BOTH COURTS.

THOMAS' LESSEE vs. GODFREY, et al.—June, 1831.

The construction of a grant is for the court, and not a matter proper to be submitted to a jury, except in a case of latent ambiguity.

It is a well established rule of construction, that calls, whether to artificial or natural objects, are to be preferred to courses and distances; therefore, when a tract of land is described by courses and distances, and calls, the calls are to be gratified in the construction of the grant, if they can be established, and the courses and distances disregarded, if they do not correspond with the calls.

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Where there are two inconsistent expressions or calls, both of which cannot be gratified, but either of which standing alone would be imperative, that which appears to be the most certain, and most consonant to the intention apparent upon the face of the patent, should in the construction of it, be preferred, for the same reason that calls are preferred to courses and distances, because more certain. Or if there is any thing on the face of the patent to explain or qualify one of them, so as to show, that the other was intended to be the governing or imperative call, it should be so treated.

So where the patent for a tract of land described it as "beginning at a bound hickory on the side of a hill, on the S. side of the main falls of *Patapsco*, respecting to the W. *Chew's Resolution Manor*, and running with the said manor, S. &c. 200 p. to a bound hickory, then N. W. 340 p. to a bound white oak, then N. &c. 250 p. to the main falls of ———, with the main falls by a direct line to the first bound tree. HELD, that according to the construction of the patent, the first line thereof should be run from the first to the second bounded hickory, and that the words "running with the said manor," did not constitute a peremptory call, but like the course and distance, were directory only to the principal call the tree. And that as to the home line, it should be run from the termination of the third line, direct to the beginning tree, the words "with the main falls" being qualified by the subsequent terms "direct line."

APPEAL from *Anne Arundel County Court*.

Ejectment for a tract of land called "*the Valley of Owen*," commenced by *Allen Thomas*, the lessor of the plaintiff, against the appellees, *Samuel Godfrey* and others, on the 29th March, 1826. The defendants pleaded not guilty, and took defence on warrant. A warrant of resurvey issued and plots were returned. Defence was taken for the whole of the tract of land called "*Stout*," as located by them on the plots; for the tract called "*West Ilchester*," as located by them upon the plots; for the tract called *Caleb's Vineyard*," as located by them; for the tract called "*Littleworth*," as also located by them; for all that part of the tract called "*Prestedges' Folly*," (as also located by them) which lies to the west of the third line of the *Valley of Owen*, as that line is located by them, in their second location of the *Valley of Owen*; and for all the other land which lies south and west of, and upon said location of said third line, and which is included in plaintiffs fourth location of

the *Valley of Owen*, and which by a written agreement between plaintiffs and defendants, on file in the cause, is admitted to be covered by the location of the tracts called "*Timber Neck*," "*Jefferson*," and "*Littleworth*."

1. At the trial the plaintiff read in evidence to the jury subject to all exceptions, the certificate of the "*Valley of Owen*," issued on a warrant of resurvey returned by *Richard Owen*, on the 7th of September, 1703, describing the said land as "beginning at a bounded hickory on the side of a hill on the south side of the main falls of *Patapsco*, and respective to the west *Chew's Resolution Manor*, and running with the said manor south 53 degrees west, 200 perches to a bounded hickory, then north-west 340 perches, to a bounded white oak, then north 53 degrees east, 250 perches, to the main falls, thence with the main falls by a direct line to the first bounded tree, containing, &c." And also with like exception, read in evidence the patent for the said tract, granted to *Richard Owen*, on the 20th May, 1705. The description of said tract in the patent is as follows: "Beginning at a bound hickory, on the side of a hill, on the south side of the main falls of *Patapsco*, respecting to the west *Chew's Resolution Manor*, and running with the said manor, south 53 degrees west, 200 perches to a bound hickory, then north-west 340 perches to a bound white oak, then north 53 degrees east, 250 perches to the main falls of, with the main falls by a direct line to the first bound tree, containing, &c."

And the plaintiff offered to prove by other title papers, a title in the lessor of the plaintiff to the said tract of land, derived from the said *Richard Owen*, the patentee; and gave in evidence the certificate of a tract of land called "*Chew's Resolution Manor*," surveyed for *Samuel Chew*, the 15th April, 1698. The defendants then objected, that the certificate, and patent of "*The Valley of Owen*" herein before mentioned, were inadmissible in evidence, because there was no location upon the plots of said tract, by the plaintiff, corresponding with the description, and calls, in

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said certificate, and patent; which objection the court sustained, and instructed the jury that said certificate and patent were not admissible, the same not having been located to bind on a tract of land called "*Chew's Resolution Manor*," as required by the peremptory call in said certificate and patent. The plaintiff excepted, and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J., EARLE, MARTIN, and ARCHER, J.

A. C. Magruder, for the appellant, contended,

1. That there is no peremptory call to the tract of land called "*Chew's Resolution Manor*," there being no particular point or line, or side of said tract to which the first line is to go. 2. That the words in the patent, "respecting to the west *Chew's Resolution Manor*," and in the certificate, "respective to the west *Chew's Resolution Manor*," are unintelligible, and must be rejected; and that the true location of the line is to commence at the "bound hickory," spoken of, as the beginning, and run thence (without regard either to the expression "respective to the west," &c. or to the course and distance,) to the second bound hickory mentioned in the grant. 3. That according to the true construction of the grant, the line which commences at the bounded white oak (third boundary) is to run thence the course mentioned in the grant, with an allowance for variation to the main falls, and that the closing line, is to run with, or along, and not as the defendant's counsel contended, from the main falls. He referred in the argument to *Helm's vs. Howard*, 2 Harr. and McHen. 82. *Calhoun vs. Hall*, Ib. 116. *Pennington vs. Bordley*, 4 Harr. and Johns. 450. *Rogers vs. Moore*, 7 Ib. 141. *Mundell vs. Clerklee*, 3 Harr. and Johns. 469. *Hammond vs. Ridgely*, 5 Harr. and Johns. 245, 256, 274. *Davis vs. Batley*, 1 Harr. and Johns. 264. Act of 1830, ch. 186.

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R. Johnson, for the appellee.

1. The question is as to the true location of the *Valley of Owen*, omitting the first line. A patent not *legally* located cannot be read in evidence. *Hughes vs. Howard*, 3 *Harr. and Johns.* 9. *Pennington vs. Bordley*, 4 *Ib.* 450, 471. *Mundell vs. Clerklee*, 3 *Ib.* 469. The court is the tribunal to determine the true construction of the grant. *Hammond vs. Ridgely*, 5 *Harr. and Johns.* 245. The expressions in the patent of the *Valley of Owen*, are such as to require it to bind on *Chew's Resolution Manor*. When a junior grant calls for the line of an elder, the call is peremptory, and it is not material whether a particular line is called for or not. *Carroll vs. Norwood*, 5 *Harr. and John.* 163. In addition to the call for the manor, there is a call for a hickory, as the termination of the first line, and if both are peremptory, and incapable of being gratified, the grant is void. *Rogers vs. Moore*, 7 *Harr. and Johns.* 141. If both calls can be gratified, they should be. When a tree and the line of a tract of land are called for, you are first to go to the nearest, and then if the distance is exhausted before you reach the other call, you must elongate it, or run a new line, if it be necessary to do so, to reach the most remote call. The reasoning of the court in *Howard vs. Helms*, 2 *Harr. and McHen.* 80, cited on the other side, has been decided to be erroneous. *Pennington vs. Bordley*, 4 *Harr. and Johns.* 458. 2. If in running the home line of the *Valley of Owen*, you reject the word *direct*, used in the patent, seventeen or eighteen new lines must be added to close the survey. If the expressions "with the falls," are gratified, you cannot get to the beginning tree, because that tree does not stand on the falls; and it follows therefore, that if the expressions, "with *Chew's Resolution Manor*," are to be rejected, because by so running you cannot get to the bounded tree called for, you must for the same reason, reject the words "with the falls," because if you run with the falls, you can never get to the beginning tree. He insisted that the last line should be located, so as to run as near the

falls as practicable, consistently with its being straight. *Pumphrey vs. Ashpaw*, 4 *Harr. and Johns*. 368. The act of 1830, *ch.* 186, he said was prospective, and therefore did not apply to the present case, which was pending at the time of its passage.

Taney, (Attorney General) in reply.

None of the plaintiff's locations profess to bind "*Chew's Resolution Manor*," but the defendant's do, and if, therefore, the *Valley of Owen* should be so located, the patent may be read in evidence, the lines being on the plots, though placed there by defendants. 1. The error of the County Court was in considering the call for "*Chew's Resolution Manor*" imperative, equally so with the call for the tree, and deciding that both must be gratified. One of the reasons assigned for preferring calls to course and distance, is, that the former are supposed to be most beneficial to the grantee; but the principal reason is, that calls are most certain. *Rogers' lessee vs. Raborg and Redding*, 2 *Gill and Johns*. 63, 64. The last rule of interpretation applies to cases of any other nature, and if one description is more certain than the other, and both cannot be gratified, the most certain is to be adopted. The principle being, that *certainty* in the description is to be preferred, even calls will give way to course and distance, if the latter furnishes the greater certainty; as in the case of a call for the line of a tract of land, without saying which line, or how far you are to run with it, and a description by course and distance. But in this case, there is not merely course and distance opposed to an uncertain call, but there is another and perfectly certain call, inconsistent with the first call. The call for *Chew's Resolution Manor* does not, when reached, instruct you in what direction you are to run, or to what extent. The certainty, which is the motive for preferring calls to course and distance, is not the certainty of the *call*, but because those calls usually enable you to determine with precision, the line to be run; and when they do not effect that object,

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the principle which induces their adoption totally fails. But suppose the calls for *Chew's Resolution Manor*, and the tree, are equally peremptory, and wholly inconsistent, still the grant would not be void; the construction most favorable to the grantee, would then prevail, and the fact, as to which would be most favorable to the grantee, would be for the jury,—and if the judge could not decide which would be most advantageous to grantee, the ambiguity would be a *latent* one, and the jury would in that case, have to say, which was meant by the party. *Davis vs. Batty*, 1 *Harr. and Johns*. 268, 269. *Connelly vs. Bowie*, 6 *Harr. and Johns*. 143. *Helmes vs. Howard*, 2 *Harr. and McHen*. 82. The locations on the plot were sufficient to authorise the reading of the grant in evidence, although its interpretation should be, as contended for by the appellee. There were lines on the plot conforming to our interpretation of it, and whether the grant was admissible or not, depended upon the state of the evidence, at the *time* it was offered, and it was not competent to the defendant, to introduce other evidence at *that time*, to show its inadmissibility. The court was to instruct the jury as to the construction of the patent, and they should find accordingly, but still the patent should have been received in evidence. *Shield vs. Miller*, 4 *Harr. and Johns*. 1. *Connelly vs. Bowie*, 6 *Ib*. 143. *Pennington vs. Bordley*, 4 *Harr. and Johns*. 457, 458. *Hughes vs. Howard*, 3 *Ib*. 9, 13. 2. The question here is upon the location of the *last* line, whether that line has a binding call on the falls or not. It calls to run with the falls, and although described as a straight line, being a binding call, it must follow the stream, according to its call. *Hammond vs. Ridgely*, 5 *Harr. and Johns*. 256, 274, 275. He insisted that the act of 1830, *ch*. 168, did apply to the present case, the only doubt being, whether it applied to any but depending appeals. As evidence of the language, usually employed in such laws, he referred to the acts of 1785, *ch*. 80. 1801, *ch*. 74, *sec*. 38. 1815, *ch*. 149, *sec*. 3. 1806, *ch*. 90. 1804, *ch*. 55, *sec*. 3.

BUCHANAN, Ch. J., delivered the opinion of the court.

The action was brought for a tract of land called "*The Valley of Owen*," and the question is, how that land should be located, which depends upon the construction of the patent. That the construction of a grant falls peculiarly within the province of the court, and is not a matter proper to be submitted to a jury, except in a case of latent ambiguity, is a principle too long and too well established, now to be disputed in this court. What then is the construction proper to be given to the patent for "*The Valley of Owen*?" The expressions are, "beginning at a bound hickory on the side of a hill, on the south side of the main falls of *Patapsco*, respecting to the west *Chew's Resolution Manor*, and running with the said Manor, south 53 degrees west, 200 perches to a bound hickory; then north west, 340 perches, to a bound white oak; then north 53 degrees east, 250 perches, to the main falls of, with the main falls, by a direct line to the first bound tree." It is a well established and known rule of construction in the courts of this State, that calls, whether to artificial or natural objects, are to be preferred to courses and distances; therefore, when a tract of land is described by courses and distances, and calls, the calls are to be gratified in the construction of the grant, if they can be established, and the courses and distances disregarded, if they do not correspond with the calls. The better reason for which, is believed to be the greater certainty afforded by calls, than by courses and distances. In this case it is contended, that the expressions, "and running with the said manor," constitute a peremptory call to the tract of land called "*Chew's Resolution Manor*," and that "*The Valley of Owen*" must be located to bind on that tract, and it was so decided by the court below. But we think they were not used in that sense; and that being associated with a course and distance expressed in the patent, and a further call to a tree, a fixed and natural object, they are not to be interpreted as importing an imperative, or peremptory call, to run

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with, and bind upon "*Chew's Resolution Manor*," but that the tree called for, was intended as the principal object, the boundary to regulate the location of that line; and the reference to "*Chew's Resolution Manor*," and the course and distance expressed, directory only to that object, and introduced but as a means of arriving at it. The expressions used are, "and running with the said manor south 53 degrees west, 200 perches to a bound hickory." It is not the case of a course and distance line of one tract of land, calling to, or to run with, or bind upon, a water course, or another tract of land, or a line of another tract, with no ulterior object called for, and looking only to the water course, or other tract, or line, as the definite object to be reached or run with, and to which the course and distance expressed, if not corresponding with it, is made to yield. But here, there is a fixed ulterior object, a tree imperatively called for and designated as the boundary intended to be run to; which intention, apparent upon the face of the patent, explaining and qualifying the expressions "running with the said manor," and showing them to have been used, not as binding expressions, but as directory only to the tree called for, must be gratified, by running the first line from the beginning tree, to the tree called for, (if it can be proved,) in the manner directed in the patent, if that can be done; but if it cannot be done, either by running the course and distance expressed, or by a running binding upon the manor, then, the direction failing, a course must be shaped from the beginning directly to the tree called for, without regard to either the manor, or the course and distance expressed; the true position of that tree to be determined by a jury, whose province it always is, to find facts, and to ascertain the true position of the object called for, from the evidence submitted to them; but not to determine the question, whether or in what manner a call shall be gratified, or any question of construction arising upon the face of the patent. That belongs exclusively to the court, whose peculiar province it is to ex-

pound patents, according to the intention to be collected from the terms or expressions used, and not on facts or matter *aliunde*. Where a tract of land, or a line of a tract of land, is peremptorily called for as the governing object, it controls the course and distance for the greater certainty. But where such a line is referred to, with a view to another object peremptorily called for, that object is the imperative call, and not the line referred to; and must be gratified, whether its position corresponds with the line referred to or not. As where there is a call to a tree, described as standing in, or at the end of a specified line of another tract of land, then the reference to the line, is not considered as a peremptory call, controlling the call to the tree; but the call to the tree is the imperative call, and must be gratified if it can be established, no matter where it stands, without regard to the line; which is to be taken, as intended only as a *designatio loci*, where the tree was supposed to stand. We differ therefore with the court below, in the opinion, that the expressions, "running with the said manor" as used in the patent for the *Valley of Owen*, constitute a peremptory call, and that the first line of that, must be located to bind "on the land called *Chew's Resolution Manor*.

But as the patent was rejected on the ground, that there was no location of it upon the plots, returned in the cause, corresponding with the description and calls expressed, it is necessary to inquire, how the home or given line should be located, which is not altogether free from difficulty. The third line has a call to the main falls, and from that point the description is, "with the main falls by a direct line to the first bound tree." And the question is, whether that line should be run with the meanders of the stream, or directly from the termination of the third line on the falls, to the beginning tree? Where there are too inconsistent expressions or calls, both of which cannot be gratified, but either of which standing alone, would be imperative, that which appears to be the most certain and most consonant to the intention apparent upon the face of the patent, should

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in the construction of it, be preferred, for the same reason that calls are preferred to courses and distances, because more certain. Or, if there is any thing on the face of the patent to explain or qualify one of them, so as to show that the other was intended to be the governing or imperative call, it should be so treated. Here the expressions, "with the main falls," and "by a direct line," to the first bound tree, are inconsistent, and cannot both be gratified, if the stream is not straight, or does not run to the beginning tree; and it seems to us, that the expressions, "with the main falls," are so qualified by the other expressions, "by a direct line," as to show, that the latter were intended as the governing or controlling expressions, and that the given line should be run directly from the place of departure to the beginning tree, the object imperatively called for, and that by the words, "with the main falls," the general course of the stream was meant, the meanders of which could not be pursued by a single direct line. If it was intended that the survey should be closed, by pursuing the meanders of the stream from the end of the third line to the beginning tree, the expressions would properly and most probably have been "with the main falls to the first bound tree," and not as they are, "by a direct line" to the first bound tree. Which addition of the words, "by a direct line," shows that the meanders of the stream were not intended, which could not be by a direct line, but that it was intended to close the survey by a single line drawn from one point to the other. Besides, the beginning tree is not described as standing at or by the stream, but on the side of a hill; the surveyor, therefore, at the time of taking up the land, must have known that the survey could not be closed by pursuing the meanders of the stream, which did not run to the tree called for, but that it would be necessary to shape an arbitrary course from the stream, in order to get to the tree, which would be entirely inconsistent with a direct line from point to point; and assist in showing that the words, "with the main falls," were not intended to be used as binding ex-

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pressions, but are qualified and controlled by the words next following, “by a direct line.” We think therefore, that “*The Valley of Owen*,” must be located by running the given or home line, directly from the termination of the third line to the beginning tree, wherever they may be found to be; and not being so located by the plaintiff on the plots returned in the cause, but by running it with the meanders of the main falls of *Patapsco*, and by an arbitrary line drawn from that stream to the beginning tree, in order to close the survey, and without which, it could not be done, that the patent was not evidence to support his location so made.

JUDGMENT AFFIRMED AND PROCEDENDO AWARDED,

Under the act of 1830, ch. 186.

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According to the principles of equitable jurisprudence, the personal estate is the natural fund for the payment of debts and legacies, and generally speaking, is first to be exhausted, before resort can be had to real property. Where a testator charges both his real and personal estate with the payment of debts and legacies, and a purchaser of the real estate desires to have his bonds given for the purchase money, applied to release his purchase from the charge in the will, it should regularly appear upon the face of his bill, that the whole personalty had been applied towards the payment of debts and legacies. That must appear before a Court of Equity could decree the land to be liable for such purpose, and ought to be expressly averred.

That averment is so essential, that where it ought to have been made, and was not, although it was stated in the decree passed by the County Court, that the solicitors of the defendants admitted the whole of the personal estate to have been applied towards the payment of debts and legacies, yet as a party must always obtain redress according to his allegations and proofs, the appellate court reversed the decree containing that statement, but without prejudice.

APPEAL from the Equity side of *Washington County Court*.

The bill which was filed in this case by the appellees, *John Brewer and Adam Troup*, against the appellant,

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John Hoye, Jacob Fiery, and others, on the 23d day of January, 1829, stated that *Henry Fiery* died seized of a large and valuable real estate, which he devised to his three sons, *Henry, Joseph* and *Jacob*, to the last of whom he devised a tract of land lying in *Franklin* county, *Pennsylvania*. That he bequeathed to his three daughters, *Mary, Catharine*, and *Susanna*, the sum of £3000 each, to be paid to them, as they respectively attained the age of eighteen years, by his said three sons, whom he appointed his executors; that he charged his real and personal estate with the payment of his debts and legacies. The bill further states, that *John Brewer*, one of the complainants, in the year 1819, entered into articles of agreement with *Jacob Fiery*, one of the devisees, for the purchase of the tract of land devised to him, lying in *Franklin* county aforesaid, and paid a considerable part of the purchase money, and gave his bonds, with *Adam Troup*, the other complainant, as his security, for the payment of the balance of the purchase money. That the said *Jacob Fiery*, on or about the 17th Nov. 1820, assigned the said bonds to a certain *John Hoye* and *Ann Hoye*, who is since dead, having made the said *John Hoye*, her executor. The bill further states, that the complainant *Brewer*, had paid all the said bonds to the said *John Hoye*, except the two last, upon which suits have been instituted in *Washington* County Court, by *Hoye* against him the said *Brewer*. The bill further states, that the legacies bequeathed to two of the daughters have been paid; that the one bequeathed to his daughter *Susanna* had not been paid, and still remained a charge upon the land bought by him of said *Jacob Fiery*, in virtue of the provisions of his father's will. The said complainant, *John Brewer*, further states, that he has reason to believe that the bonds remaining due to said *Hoye*, upon which suits had been brought, would not be more than sufficient to extinguish the liability of the land purchased by him, to satisfy the legacy to *Susanna*, charged upon it. The bill further states, that at the time *Brewer* executed his bonds to *Fiery*, he did not know of the incumbrances upon

the land bought by him, nor did he know of the same at the time of the assignment of his bonds to *Hoye*, or at the time he paid the several sums of money to him; that since the discovery of the said incumbrance, he has paid nothing, by reason of said assignments; that at the time he executed his bonds, he did not know that his bonds were to be assigned to *Hoye*, or to any other person. The object of the bill is then stated to be, to ascertain, whether the balance of the purchase money due by him, ought to be applied in the first instance, to satisfy the legacy due to the said *Susanna*, and if it should be so determined, that the bonds should be delivered up to *Henry Angle*, with whom the said *Susanna* had intermarried, and he be authorized to receive the money due thereon, from said *Brewer*, and give acquittances therefor. The bill then prays for an injunction to stay proceedings on said suits, and for general relief. The deed from *Fiery to Brewer* bears date on the 20th November, 1820.

The answer of *John Hoye* to the said bill states, that in or about the year 1820, *Jacob Fiery*, one of the defendants, was indebted to him and *Ann Hoye*, since dead, in a considerable sum of money, and that he being pressed for payment at that time, by him the said *Hoye*, offered to assign to him and the said *Ann Hoye*, certain bonds which he was about to obtain from the complainant, *John Brewer*; that he agreed to receive the bonds as collateral security for the said debt, and on a day appointed for that purpose, accompanied the said *Jacob Fiery* to the house of the complainant, in order to take an assignment of the said bonds, as soon as they were executed. That *Brewer* expressed some apprehension, that if he executed the bonds, and they were assigned to him, *Hoye*, that he would press him for the payment of the money; that he assured *Brewer* he need not be under any uneasiness on that score; that all he wanted was to have his debt secured, and that he would not urge the payment for a considerable time, provided he would pay the interest punctually; that on receiving these assurances, *Brewer* appeared to be satisfied, and that the bonds were

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executed by *Brewer*, and assigned by *Fiery* to him, *Hoye*. That in consideration of receiving said bonds, he stopped further proceedings against the said *Jacob Fiery*, and relied upon the said bonds to discharge the said debt, due from the said *Jacob* to him and the said *Ann*, &c.

In the will of *Henry Fiery* exhibited with the bill, there are the following clauses :

“To each of my three daughters, *Mary*, *Catharine*, and *Susanna*, I give a bed, and the sum of £3,000, to be paid by my executors hereinafter named, as the said girls may respectively attain the age of eighteen years.” “I charge the lands devised to my three sons, (*Henry*, *Joseph*, and *Jacob*,) and all the personal property whereof I die possessed, which is not herein before specifically devised, with the payment of my just debts, legacies, and devises, herein before given and made.”

The deed from *Jacob Fiery* to complainant, *Brewer*, also exhibited with the bill, bearing date November 20th, 1820, recites, “that whereas *Henry Fiery* did, by his last will and testament bequeath to his son *Jacob Fiery*,” a certain tract of land, &c.

There were other defendants to the bill, but their answers are considered immaterial.

The case was referred to the auditor, for the purpose of ascertaining the amount due upon the legacy to *Susanna*.

Afterwards, the County Court [TH. BUCHANAN, A. J.] passed the following decree: The above cause coming on to be heard, and being submitted for final decision by the solicitors of the parties, and it appearing from the report of the auditor, made pursuant to the order of this court, that there is still due to *Susanna*, one of the daughters and legatees of *Henry Fiery*, deceased, the sum of \$12,257, with interest upon \$8,000, part thereof from the 15th day of June, 1829; and it appearing further from said report, and proceedings in this cause, and the same being admitted by the solicitors of the defendants in court, that the whole of the personal estate of the said testator, has been applied towards

the payments of the debts and legacies, and that the amount still due by *Jacob Fiery*, as one of the executors and devisees of the said testator, to the said *Susanna*, exceeds in amount the balance unpaid, on the bonds of the said *John Brewer*, to the said *Jacob Fiery*, and by him assigned to the said *John Hoye*. It is thereupon this third day of June, 1829, adjudged, &c. that the injunction heretofore granted, be made perpetual.

From this decree the defendant *Hoye*, appealed to the Court of Appeals.

The cause was argued before EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

By *Anderson* and *Taney*, (Attorney General,) for the appellants. *Price* and *Yost*, for the appellees.

STEPHEN, J., delivered the opinion of the court.

After adverting to the facts alleged in the pleadings, he said, according to the principles of equitable jurisprudence, the personal estate is the natural fund for the payment of debts and legacies, and generally speaking, is first to be exhausted, before resort can be had to the real property. In the present case, the testator charges both his real and personal estate with the payment of his debts and legacies, and it should regularly appear upon the face of the pleadings, that the whole of the personalty had been applied, towards their extinguishment, before a court of equity could consistently, with established principles, decree the land to be liable for that purpose. The bill in this case does not expressly charge a deficiency of the personal fund; on the contrary, it only alleges that fact by a vague and doubtful implication, where it states, that he has “reason to believe that the bonds in suit as aforesaid, will not more than cover the liability of the said land.” An averment so essential to the complainant’s merits, ought to be expressly made, and not left to argumentative inference or construction. If the personal estate

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was adequate to the payment of the legacies, no liability could ever attach upon the land purchased by the complainant, and of course there would be no ground for his application to a court of equity for relief; although therefore, it was admitted, as stated in the decree, that the personal assets were exhausted, yet, as in equity, a party must always obtain redress *secundum allegata et probata*, without deciding upon the other points, raised during the discussion; we think the decree of the court below must be reversed, but without prejudice.

DECREE REVERSED.

HYSINGER vs. T. & P. BALTZELL.—June, 1831.

By the act of Nov'r. 1765, *ch. 12*, it is declared, that if a person who is liable to an action, shall be out of the province at the time the cause of action hath accrued, he shall have no benefit or advantage from the act of 1715, *ch. 23*, (the act of Limitations) provided, the person who has such cause of action shall prosecute the same, after the presence, in this province, of the person liable thereto, within the time or times limited, in and by the said act of 1715. HELD, upon the construction of this act:

1. That the acts of 1715, *ch. 23*, and 1765, *ch. 12*, are to be taken together, and to receive a construction to carry into effect the plain and obvious intention of the Legislature, that limitations should not attach against a creditor, where the debtor was absent from the *State*, at the time the cause of action accrued.
2. That if at any time after the cause of action accrued, the debtor, by his presence in the *State*, afforded the creditor an opportunity to prosecute his writ with effect, he should institute his action within the time required by the act of 1715, or his claim would be barred by limitations.
3. To bring a case within the act of 1765, the presence of the debtor within the *State*, must be such as to enable the creditor to avail himself of it; a secret, concealed, clandestine presence for any length of time, of which, the creditor could not take advantage, would not be sufficient. It must be so public, and under such circumstances, as to give the creditor an opportunity, by the use of ordinary diligence and due means, to arrest the debtor.

Where a cause of action accrued in October, 1822, when the defendant was a resident of another *State*, and it appeared, upon a *case stated*, that the defendant was in *Baltimore*, where the plaintiff resided, in April 1823, "purchased other goods from the plaintiff, and remained there for two days,"
 { It was HELD, that limitations did not then attach, because it did not ap-

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pear at what time during those two days, the defendant made his purchase; nor whether the plaintiff had an opportunity to sue out a writ against him with effect.

Upon a case stated, the court can supply no fact by implication.

APPEAL from *Washington County Court*.—*Assumpsit* by the appellees, *Thomas and Philip Baltzell*, against the appellant, *Christian Hysinger*, instituted November 13th, 1826, for goods, wares and merchandize, sold and delivered by the appellees, to the appellant and *John Strealey*. *Non Assumpsit* and Limitations were pleaded. A verdict was taken by consent, for the plaintiffs, subject to the opinion of the court, upon the following statement of facts—viz :

“That at the time when the goods in the declaration mentioned were sold and delivered, the plaintiffs were, and still are merchants, residing in *Baltimore*, and that the defendant resided in *Chambersburg*, in the State of *Pennsylvania*, from that time until November, 1824, when he removed to *Maryland*. It is further admitted, that the said goods were sold and delivered to the defendant, on the 13th of April, 1822, upon a credit of six months. That in the month of December, 1822, the defendant made a payment, in *Baltimore*, to the plaintiffs, upon another claim, which they had against him. In April, 1823, the defendant purchased other goods from the plaintiffs in *Baltimore*, for which he paid the cash, and remained there two days. That, at that time, the defendant admitted the money, now in question, to be due, and promised to pay it. That the defendant was again in *Baltimore*, in the summer of 1823, and his being there was known to the plaintiffs. If the court shall be of opinion, that the defendant can, under these circumstances, avail himself of the statute of limitations, then judgment for the defendant, otherwise for the plaintiffs. Either party to be at liberty to appeal, or sue out a writ of error.”

The County Court, upon the preceding statement, gave judgment on the verdict for the plaintiffs, and the defendant brought the present appeal.

The cause was argued before MARTIN, STEPHEN, ARCHER, and DORSEY, J.

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Price, for the appellants, contended,

1. There being no replication, the issues are formed, by what is affirmed by the declaration, and denied by the pleas; and that the facts agreed, can be considered only, with a view to the truth or falsehood of the issues, thus formed.

2. Had there been a replication in proper form, stating that the defendant, at the time the cause of action accrued, was absent out of the State, still the facts agreed, were sufficient to entitle the appellant to the judgment of the court below.

He referred to the act of 1765, *ch. 12, sec. 2, 3.*

Mayer, for the appellees.

1. The case stated is a part of the record, and is considered as constituting a part of the pleadings. The statement of facts in this case, shows the ground relied upon to avoid the bar of the statute, and is equivalent to a special replication.

2. The mere circumstance of the presence of the defendant, at the time the cause of action accrued, is not sufficient to entitle him to the benefit of the statute, unless the plaintiff had a reasonable opportunity of suing him with effect, and the case stated should exhibit the fact. He referred to *Fowler vs. Hunt*, 10 *Johns. Rep.* 465. *White vs. Bailey*, 3 *Massa. Rep.* 271. Acts of 1715, *ch. 23, sec. 4*, and 1765, *ch. 12, sec. 23*, and to *Oliver vs. Gray*, 1 *Harr. and Gill*, 216.

MARTIN, J., delivered the opinion of the court.

This was an action of *assumpsit* instituted to recover the value of certain goods, wares and merchandizes, sold and delivered by the plaintiffs, to the defendant and a certain *John Strealey*. To the declaration filed in this cause, the defendant pleaded *non assumpsit*, and *non assumpsit infra tres annos*. The record contains no replication to these pleas, although the jury were sworn to try the issues between the parties. This omission, we are induced to believe, proceeded from an agreement, that a mere formal verdict should be taken by consent, subject to the opinion of

the court upon a case stated. Under the impression, that this agreement was intended by the parties, as a waiver of all irregularity in the pleadings, and that the court should decide upon the law, presented by the case stated, we proceed to review their opinion.

It is admitted, the goods, wares and merchandizes were sold and delivered on the 13th of April, 1822, upon a credit of six months; the debt was therefore demandable on the 13th of October, 1822, and if no impediment had interposed, limitations would attach at that time; this however, was prevented by the absence of the defendant from the *State of Maryland*. The presence of the defendant in the *State*, in December, 1822, would not bar the plaintiffs' action, because the defendant, in 1823, admitted the debt and promised to pay it, which acknowledgment revived the original cause of action. In April, 1823, the defendant was in *Baltimore*, remained there two days, was with the plaintiffs, and had dealings with them. He was also in *Baltimore* in the summer of 1823, and the plaintiffs knew it. If then, limitations attached in April, 1823, or afterwards in the summer of that year, the action would be barred, because more than three years had elapsed, from either of those periods, before the institution of this suit, which was on the 13th of November, 1826.

By the act of 1715, *ch.* 123, it is enacted, (among other things) that all actions on the case upon simple contract, book debt or account, shall be commenced within three years ensuing the cause of such action, and not after; and by a supplementary act in November, 1765, *ch.* 12, it is declared, that if a person who is liable to an action, shall be absent out of the province at the time the cause of action hath accrued, he shall have no benefit or advantage from the act of 1715, provided, the person who has such cause of action, shall prosecute the same, after the presence, in this province, of the person liable thereto, within the time or times limited in and by the said act of 1715. These acts are to be taken together, and to receive a construction to

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carry into effect the plain and obvious intentions of the Legislature, that limitations should not attach against a creditor, where the debtor was absent from the *State* at the time the cause of action accrued, because no beneficial result could be expected from the suing out a writ, when the debtor could not be arrested. But this privilege should cease, when the cause upon which it was founded, was removed. If, therefore, the debtor, at any time after the cause of action accrued, by his presence in the *State*, afforded the creditor an opportunity to prosecute his writ with effect, he should institute an action within the time required by the act of 1715, or his claim would be barred by limitation. To bring the case within the act of 1765, the presence of the debtor in the *State*, must be such as to enable the creditor to avail himself of it. A secret, concealed, clandestine presence, for any length of time, of which the creditor could not take advantage, would not be sufficient. It must be so public, and under such circumstances, as to give the creditor an opportunity, by the use of ordinary diligence, and due means, to arrest the debtor.

The court were called on, to apply this law to a statement of facts agreed on by the parties, and they were bound to decide upon *those facts*, as in the case of a special verdict; they could make no inferences unless they be of law, or such as are clear, undeniable deductions from the statements agreed on. It is competent for a jury to draw inferences from testimony submitted to them; but that power is not extended to a court, when required to act on a case stated, where nothing can be supplied by implication. It is stated the defendant was in *Baltimore*, in April, 1823, purchased other goods from the plaintiffs, and remained there for two days. The first impression made upon the mind, by these facts, might fairly be, that this afforded the plaintiffs an opportunity to sue out a writ, and arrest the defendant; but when we apply the strict rule of law, that the court must decide upon *those facts alone*, without deducing any inference from them, or supplying any other fact, to aid them, we will

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find all those stated facts may be true, and yet the plaintiffs were not in default. It might be true the defendant was in *Baltimore* for two days, and that he purchased goods from the plaintiffs, yet if their knowledge of his being there arose *solely* from the purchase made, and that purchase was made *immediately* before the defendant left the city, that would not afford them an opportunity to sue out a writ with effect. If it had been stated, that the defendant was in *Baltimore* for two days, and that the plaintiffs knew he was there for *that space of time*, *laches* might be imputed to them; but this is not stated, and the court could not infer it. The same remarks will apply to the presence of the defendant in *Baltimore*, in the summer of 1823. He was there, and the plaintiffs knew it; *non constat*, that he was there within the knowledge of the plaintiffs, *for so long a time* as would have enabled them to have a writ with a reasonable expectation of deriving a beneficial effect from it.

We are, therefore, of opinion, that the court below, being confined to the facts in the case stated, were correct in the judgment they pronounced.

JUDGMENT AFFIRMED.

BENJAMIN AND WILLIAM RICHARDSON vs. STEPHEN JONES.—*December, 1831.*

The policy of the law forbids that a trustee should become a purchaser, directly or indirectly, at his own sale; and if he does, such sale may, and will be set aside, on the proper and reasonable application of the parties interested.

The rule, that a trustee shall not become a purchaser at his own sale of the trust property, was not adopted in favor of trustees, but for the protection of the interest of the *cestui que trust*.

Chancery will not interpose and set aside a sale made by a trustee, to himself, or his agent, either upon the application of the trustee or the agent.

An order requiring the principal obligor, and the sureties in a bond, given for the purchase money of land sold by a trustee of the Court of Chancery, to pay such purchase money to the trustee, or bring it into court, or show cause to the contrary by a given day, is purely interlocutory, settles nothing between the parties, and is not the subject of an appeal.

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Where a sale is made under a decree, or order in Chancery, and *no bond or security* is given for the payment of the purchase money, the purchaser may be compelled to complete his purchase, by an order on him in a summary way, to pay or bring the money into court.

But when a bond is given to the trustee for the purchase money, under an order of sale from Chancery, requiring a bond to be given, and the sale has been ratified, the purchaser and his sureties cannot be compelled to pay the bond in a summary way, by an order from Chancery. This constitutes a legal contract to be enforced at law.

No action at law will lie to enforce a decree in Chancery, within the territorial jurisdiction of the Court of Chancery. That court enforces its own decrees.

An order of the Court of Chancery, ratifying a trustee's sale where no bond has been given, or the sale is for cash, is considered as amounting to a decree for the payment of the purchase money, and if that court could not enforce the execution of it, it could not be enforced at all. The trustee cannot, before ratification, which is the completion of the contract, claim to enforce it in equity, nor after ratification can he sue upon it at law.

Where a bond has been given in conformity to the order of sale, the ratification is an adoption of the bond only.

Where a purchaser at a trustee's sale gave his bond in conformity with the order of sale, but afterwards, by fraud, defeated the action at law brought upon his bond, he may still be made responsible in equity for the purchase money, upon a bill shewing his improper conduct, though in the mean while limitations may have barred the bond at law.

APPEAL from the Court of Chancery.

In the year 1816, *Abraham Jarrett* filed a bill in the Court of Chancery, setting forth that he sold certain tracts of land called *Scott's Hopewell*, and *Beall's Camp*, to *Arthur Rider*, in the year 1811; that *Rider* paid only part of the purchase money, and took possession of the land; that *Rider* died intestate, in the year 1814, leaving *Arthur Rider, Jr.* and *Sarah Rider*, since intermarried with *William Byrnes*, his heirs at law; that letters of administration were granted to *Arthur Rider, Jr.*; that the elder *Rider* was indebted to the complainant on other accounts, and his personal estate was insufficient to pay his debts. Prayer for *subpœna* to the children aforesaid and *William Byrnes*, and that the land aforesaid be sold for the payment of complainant's claim. The defendant answered the bill, confessed the claims, and consented to a decree. On the 8th January, 1817, a decree passed for the

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sale of the land, and *Samuel Richardson* was appointed trustee. On 21st January, 1817, the trustee gave bond for his trust, with *Benjamin G. Jones* and *William Richardson* as his securities. On the 25th February, 1817, *Samuel Richardson*, as trustee, reported a sale to the Chancellor, of the premises mentioned in the bill, to *Benjamin Richardson*, as the highest bidder, for \$995 50. On the 6th March, 1817, this sale was confirmed *nisi* the 15th May ensuing, according to the usual terms. On the 4th November, 1817, proof of publication of the order of ratification *nisi* was filed. The trustee filed the bond of *Benjamin Richardson*, *Abraham Jarrett* and *William Richardson*, dated 25th February, 1817, to him, as trustee aforesaid, for the amount of the purchase money, conditioned to be paid on the 25th February, 1818. On the 15th July, 1818, *Abraham Jarrett* filed a petition in the Chancery Court suggesting the death of *Samuel Richardson*, the trustee, before he had completed the duties of his trust. The Chancellor thereupon appointed *Robert Richardson* trustee. In July, 1822, *Jarrett* filed another petition, suggesting that *Robert Richardson* would not act as trustee, whereupon the Chancellor appointed *Stephen Jones* to complete the said trust. *Jones* bonded on the 28th November, 1822, which was approved on the 7th January, 1823. On the 29th August, 1828, the sale made and reported by *Samuel Richardson*, was finally ratified by the Chancellor. On the 31st March, 1829, *Benjamin Richardson* filed a petition in the cause aforesaid, setting forth the bill, answer and decree aforesaid, and alleged that, “as the day appointed for the sale approached, the said *Samuel Richardson* and *Abraham Jarrett* came to your petitioner, and informed him they had come to a determination to buy said land for their own use, and begged your petitioner to act as their bidder at the sale; they informing your petitioner, at the same time, that it was necessary when a trustee bought in property for himself on speculation, to have a third person to bid it off for him, and assigned as a reason, that he must make the deed, and he could not deed to himself. Your pe-

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petitioner refused to do this, saying, he did not understand the business, and knew nothing about the Chancery Court; but, on the said trustee's urgent importunity, and his positive assurance that it was all right, and that the trustee, and *A. Jarrett*, would pay the Chancellor for the land, he consented to oblige them, to bid in said land, and afterwards on their like assurance, and that it was all innocent matter and form, and that he must bond as the nominal purchaser, he consented to bond for said property in the manner and for the sum the trustee pointed out to him. The petition further stated, that immediately after the sale, the said trustee and *Jarrett*, entered into the exclusive possession of the land, and on the 22d April, 1817, they began to sell off said land as proprietors thereof; they sold a part to one *Wallace*, as will appear by a written receipt of *Jarrett*, hereafter to be exhibited. In the winter after *Samuel Richardson's* death, the said *Abraham Jarrett* took the surveyor of the county, and had the land laid off into three parts. In December of the same year, the petitioner was induced by *Jarrett* to give his consent, that he, *Jarrett*, should sell said land in his own name and the name of petitioner, but with the perfect understanding, that he, the petitioner, had no sort of interest therein, and was only consenting to have his name used as it was used in the bid. The said *Jarrett* sold the first part to *Benjamin Gibson*, the second to *James Wallace* for \$335 50, and the third part to *Samuel Bradford* for \$678, and took obligations to himself, *Jarrett*, and this petitioner. A bond of *Wallace*, and *Bradford's* note were handed to the petitioner, but he has never received a cent on them, he has no claim on them, and wishes to deliver them to whomsoever the court may direct. The petition then shows the appointment of *Jones*, as trustee, and alleges that by the procurement of *Jarrett*, *Jones* caused a suit at law to be instituted in *Harford County Court*, upon petitioner's bond, given under the circumstances aforesaid; that before the said suits came to trial, the widow and administratrix of *Samuel Richardson*, feeling and knowing the unjust and fraudulent nature of the

same, gave a receipt in full, as the readiest means of arresting so wrongful a procedure, and sheilding an innocent defendant. On the production of the receipt at the trial, the said suit was non-suited. The petition also alleged, that the said *Jarrett* received much money from his own sales of the said land, and that after *Jarrett* had sold said land in parcels, as aforesaid, and received the notes and bonds aforesaid, for the purchase money, he caused several suits at law to be brought on them in his own name, and that of the petitioner; that the petitioner knowing that he had no rightful demand against the makers of said notes and bonds, had those suits struck off the docket. And that the said *Jarrett* thus being frustrated in all his attempts to reap the fruits of his fraudulent collusion with the said *Samuel*, and fraudulent imposition on this petitioner, resolved on another course, and on the 7th February, 1825, caused the said *Stephen Jones* to file a bill on the equity side of *Harford County Court*, to compel the payment of said bond. To this bill your petitioner filed his answer, as did his securities on the bond, setting forth fully the circumstances of fraud aforesaid; a commission issued, and your petitioner, upon a very full inquiry into all the circumstances, and producing proof of them, was enabled to satisfy the court of the iniquity and injustice of the suit. At August term, 1828, the cause was finally argued, and the said court thereafter dismissed the said bill with costs. All these proceedings will be exhibited, and are prayed to be considered as part of this petition. Your petitioner also shows, that after the argument of the cause aforesaid, and before a decision of it, the counsel of the complainant (*Jones*,) applied to the Chancellor, procured a final ratification of the sale, and laid it before the judges of *Harford County Court*, before the decree of dismissal aforesaid was pronounced. Your petitioner further shews, that notwithstanding all the proceedings aforesaid, and notwithstanding the whole matter has been solemnly passed on after a full investigation by a tribunal of the complainant's (*Jones*) own choosing; your petitioner is now menaced

with an application for an attachment, or some other compulsory process, to compel your petitioner and his sureties to pay the amount of the bond aforesaid. PRAYER to be protected therefrom by order of the Court of Chancery, that his bond may be given up to be cancelled; that the said *Stephen Jones* may report to this court on the matter of this petition and his trust; that notice may be given to the parties in the original suit, viz: *Abraham Jarrett, Arthur Rider, Jr. William Byrnes*, and *Sarah*, his wife, to answer the petition, and for general relief, &c.

Arthur Rider answered the petition of *Benjamin Richardson*, and stated, that with many of the facts of the petition he was entirely unacquainted, and consequently could neither confess nor deny them; that he now is, and has long since, been entirely convinced that there was a fraudulent collusion between *Abraham Jarrett* and the late *Samuel Richardson*, in the sale of the land mentioned in the petition, and unites in the prayer, that the same may be set aside; that he has a brother, *Richard Rider*, who resides in *England*, but who was not a party to the original bill, who is one of the children and heirs at law of *Arthur Rider*, deceased:—prayer to be dismissed without costs.

William Byrnes and wife also answered the petition, declaring their ignorance of most of the facts, and belief in a fraudulent combination between *A. Jarrett* and *S. Richardson*, to sell *Arthur Rider's* land, and purchase it themselves, whereby the heirs of *Rider* would be injured:—prayer to be dismissed without costs, &c.

Abraham Jarrett's answers to the petition aforesaid—alleged that at the time *Samuel Richardson*, the original trustee, was about to sell *Rider's* land, he came to this respondent, and expressed a wish to buy the said land, but alleged, he entertained some apprehension that he might not be able to pay for it when the purchase money became due, and solicited this respondent to join him in the purchase, assuring this respondent that he would ultimately take the whole of it, but that he wished the respondent to join him in the pur-

chase only to assist him in paying for said land in the first instance; that he agreed to join said *Samuel*, who informed him he had procured his brother, *Benjamin Richardson*, to bid in said land, who bought it, being the highest bidder. That respondent felt bound to aid *Samuel* in paying for the land; that *Samuel* entered into the full and exclusive possession thereof, and sold a few acres thereof to *James Wallace*, for which *Wallace* paid this respondent and *Samuel*, by transferring a claim he had upon another person. That *Samuel* soon after died, leaving his affairs out of order, and respondent being importuned by *Benjamin R.*, who had now become uneasy as well for himself, who had bonded as purchaser, as for his deceased brother's wife and children, suggested to said *Benjamin*, that they might raise the purchase money by a re-sale of the land; he assented, and it was agreed that the land should be re-sold at public auction, by respondent and petitioner—to that end the land was divided and sold as alleged by the petitioner, in three parcels; one to *Samuel Bradford*, who bought, as this respondent understood, for himself and for *William Richardson*, the security of the petitioner; another parcel was sold to *Wallace*; another to *Benjamin Gibson*. After the sale, and the purchasers had given bond, at least *Bradford* and *Wallace*, and the said *Bradford* had permitted the said *William Richardson*, who was a party to the bond for the purchase money, to take and purchase for his own separate use, in consequence thereof the said *William R.* entered into the possession of said land. When the purchase money became due, the respondent, who held the bonds for the same in his possession, at the request of the petitioner, instituted suits in *Harford County Court*, against said *Bradford* and *William R.*, and hearing no complaint or objection to his recovery, expected at the trial term, to obtain a judgment, when, to his astonishment, the said petitioner, who was a co-obligee in said bonds, came into court and had the suits therein discontinued. The respondent then informed said petitioner, if he intended to claim the bonds for the purchase money

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arising from the *second* sale, he must expect to pay the original purchase money, and the said petitioner desired to have said bonds, which were delivered to him. Respondent then declined any further interference with said land, and applied for the appointment of *Stephen Jones* as trustee, to complete original trust. That suit was brought upon the bond for the first sale, and defeated by collusion, as stated in the petition; that the trustee (*Jones*) then filed a bill on the equity side of *Harford* County Court, and at the hearing thereof, it was objected by the said petitioner, that said court had no jurisdiction, and the cause properly belonged to the Court of Chancery, and that the said sale had not been finally ratified, and the bill aforesaid was then dismissed upon these grounds, and not upon the merits; that after said petitioner had manifested his intention of being considered the real purchaser by the course he pursued, respondent assigned his claim on the premises and has now no interest; and he denies that *Jones* has acted except in the course of his duty, and in good faith. That since the sale in 1819, *William Richardson* and *James Wallace* have been in the possession of the land sold by them, enjoyed its rents and profits, cut a large quantity of wood and timber, and diminished its value one-half, and that other persons than respondent are interested in the sale of said land; that the second sale was made at the request of *Benjamin* and *William Richardson*, and would have paid the original claim but for the misconduct aforesaid, &c.

Stephen Jones, the trustee, at the same time reported to the Chancellor, that he ascertained what the records of the Court of Chancery showed to have been done prior to his appointment, and not knowing any thing concerning the circumstances attending said sale, and believing he had nothing to do but to collect the purchase money, instituted a suit on the bond; at the trial term, under a plea of payment, the defendant produced the receipt of the administratrix of the former trustee, in whose name the suit was brought, for the use of the trustee; upon which your trus-

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tee was compelled to non-pros said suit. Your trustee, believing said receipt to be fabricated and ante-dated, filed a bill on the equity side of *Harford* County Court—his action at law, at this time, being gone, by one of the sureties in said bond becoming, on the death of the said administratrix, (which had then occurred) the administrator d. b. n. of the former trustee, to whom said bond was given; and by the answers filed to the bill, your trustee was first informed of the alleged circumstances attending the original sale. That bill was objected to at the hearing, on the ground of want of jurisdiction, and the sale not being finally ratified; and therefore was dismissed as he has understood. The report then states the possession, use and enjoyment of the land, after the first and second sales, as alleged in *Jarrett's* answer, and denies all collusion. *Prayer* that the sale may not be set aside, and that *Benjamin Richardson* and his sureties, *William R.* and *Abraham J.* may be ordered to pay the original purchase money, according to the condition of the bond given therefor, which is herewith exhibited, &c.

The bill on the equity side of *Harford* County Court, referred to in the proceedings aforesaid, was filed by *Stephen Jones*, on the 7th February, 1825. It set forth the proceedings in the original cause as they appeared in the Court of Chancery, except the order of final ratification. The suit at law by him, against the parties in the original bond, in *Harford* County Court, and the special manner in which it was defeated by fraud, as hereinbefore stated, and that no money had been paid on the original bond; that the receipt which bore date in 1822, was, in fact, given in 1824, and procured by *B. and W. R.* It also alleged the death of *Samuel's* administratrix, and the appointment of *William* as his administrator d. b. n., and the impediment which that appointment interposed at law. *Prayer* that *Benjamin R.*, *William R.*, and *Abraham Jarrett*, may be decreed to pay and satisfy the sum of money mentioned in the condition of the bond, given as aforesaid, with the interest thereon,

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and costs of the non-suit, which the said *Jones* has paid, and for general relief, &c.

At June term, 1825, *Abraham Jarrett*, filed his answer to *Jones'* bill, admitting the proceedings in Chancery, and denying all knowledge of the transactions between *Benjamin* and the administratrix of *Samuel R.*, on the receipt aforesaid; that, being surety, he gave no attention to the suit which was defended by the other parties thereto, and knows nothing of that suit, save what the record discloses. Consents to any decree which the Chancellor thinks proper to pass.

At March term, 1827, *Benjamin Richardson* answered the bill of *Stephen Jones*, admitting the proceedings in Chancery, and charging, that *Jarrett* and *Samuel Richardson* combined to become the joint purchasers of the land aforesaid. The answer then set forth the circumstances of the application to the respondent, as mentioned in his petition to the Chancellor, in this cause. His purchase of the land; his giving bond; the suit in *Harford* County at law, upon this bond and its defeat, by the mode stated in the bill; and all the circumstances of the second sale, and that he defeated the suits on the bonds given for the second sale, because the obligors had never in fact, delivered them to *Jarrett*, but that *Jarrett* took them from a table where they lay, while in conversation with the said obligors, about the title of the said land; that *Jarrett* is the sole mover of the whole affair, and the only person interested in the money sought to be recovered from him. *Prayer* to have the original bond cancelled, &c.

William Richardson's answer was similar to *Benjamin's*.

The evidence taken under the bill in *Harford* Court, established the second sale. That *William Richardson*, since 1819, has been, and still is, in possession of a considerable portion of the land; that large quantities of wood, from 2 to 450 cords, had been cut down and removed from the land since the first sale; that *Samuel Richardson*, from the first, claimed the purchase by *Benjamin*, as for his *Samuel's* ac-

count, or jointly with *Jarrett*. That the land, shortly prior to the second sale, was surveyed by order of *Jarrett*. The following receipt of *Jarrett's* was also proved.

“Received, 29th December, 1818, of *James Wallace*, Esq. an order on *Z. O. Bond*, accepted on the 29th November, 1817, for \$70, which sum is in full payment for a lot of land, being part of *Scott's Hopewell*, supposed to contain 4 or 5 acres, as per contract of sale entered into by *Abraham Jarrett*, *Samuel Richardson* and the said *James Wallace*, 22d April, 1817; and which lot of land is part of the same purchased by *Benjamin Richardson*, at the sale made by *Samuel Richardson* as trustee, under a decree of the Chancellor, and which was purchased in trust by the said *Benjamin Richardson* for the said *Abraham Jarrett* and *Samuel Richardson*; and on the settlement of that sale and business, this sum is to be accounted for by the said *Abraham Jarrett* to the said *Benjamin Richardson*, as part of the money coming to him out of said sale.—*Abraham Jarrett*.”

At the final hearing, on the 2d Monday of August, 1828, *Harford County Court* passed the following decree: “In this cause it appears to the court that the complainant is not entitled to the relief prayed by his bill. It is thereupon adjudged and decreed that the same be dismissed with costs. *Charles W. Hanson*, *Thomas Kell*.”

The evidence taken upon the petition in Chancery, went to establish the fact that the land had been stripped of nearly all its wood since the first sale, and had been chiefly in the possession and cultivation of *William Richardson* and his tenants. The proof in the equity cause in *Harford*, was read in this case by consent.

BLAND, Chancellor, on the 9th July, 1829, passed the following order:

The matter of the petition of *Benjamin R.* filed in this case, standing ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered. The bill states that the plaintiff sold to

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Arthur Rider, who is since dead, intestate, a tract of land, and that a large balance of the purchase money still remains unpaid; that the late *Arthur Rider* became indebted to the plaintiff, on other accounts, which sums also remain unpaid, and that the late *Arthur Rider's* personal estate is insufficient to pay his debts. His administrators and heirs are made defendants; and by their answer, they substantially admit the truth of the allegations of the bill. Upon which, by assent of the parties, on the 18th of January, 1817, a decree was passed, in the usual form, directing the real estate of the late *Arthur Rider* to be sold, and appointing *Samuel R.* trustee, to make the sale, who reported that he had, on the 25th of February, 1817, sold the lands to *Benjamin R.*; upon which, on the 6th of March, 1817, an order was passed that the sale be ratified, unless cause be shown to the contrary, before the 15th day of May then next. *Samuel R.* the trustee, died in the month of February, 1818, and by an order passed on the 18th of July, 1822, the present trustee, *Stephen Jones*, was appointed to complete the trust, after which no further proceedings were had in this court, until the 29th of August, 1828, when the sale was absolutely ratified and confirmed.

If the plaintiff had asked no more than the payment of the balance of the purchase, and to have his equitable lien enforced for that purpose, he would have assumed the position, and stood upon the ground of an equitable mortgagee, claiming the benefit of specific lien, and consequently the insufficiency of his deceased debtor's personal estate, would have formed no essential part of the foundation of his claim to relief. *Ellicott vs. Warfield*, July, 1829. But the plaintiff has introduced into his bill another claim against the intestate, in addition to that of the purchase money, for which he can only be allowed to obtain satisfaction out of the realty, on the ground of the personal estate of his deceased debtor being deficient. This claim gives to this suit, the nature and character of a creditor's bill, and in such a bill, a plaintiff may introduce all his claims

for the payment of money, however various, even although some may be made in his own right, and others in representative character of executor and administrator ; considering this as a creditor's bill, the decree itself should have directed the trustee to give notice to the creditors of the *late Arthur Rider*, to bring in their claims. It is not however, now too late to obtain an order for that purpose, since the trustee cannot be authorised to distribute in payment, any of the proceeds of sale, until the creditors of the deceased have been thus notified, and an account has been stated by the auditor, and confirmed by the court. It is certainly now too late, especially in this way, to inquire into the regularity of the decree of the 8th of January, 1817. I therefore put aside every thing upon that head, which was so much urged in the argument. The petitioner, *Benjamin R.* admits that he became the purchaser, as reported by the trustee, and that he gave bond for the payment of the purchase money, with *A. J.* and *W. R.* as his sureties, but he avers that he consented thus to be named and reported as the purchaser, with no view whatever to his own benefit, but for the sole and exclusive use and behoof of *Abraham J.* and the late trustee, *S. R.*, at whose express solicitation, and in whose behalf alone, he acted, and consented to be represented as the purchaser, because, as was distinctly understood and stated at the time, the trustee, *Samuel*, could not himself become a purchaser at his own sale ; and such appears to have been the fact and truth of the matter. There was nothing improper in *Jarrett's* becoming a purchaser. But a sale, however apparently fair, or in whatever way covered to a trustee, is forbidden by the policy of the law ; and therefore, had this sale been objected to on that ground, within any reasonable time, it certainly could not have been ratified. But I know of no instance in which a mere *particeps fraudis*, one who has lent himself as a cover to a sale to the trustee himself, has been allowed to come in, and have it vacated, merely because of its having been in fact made to the trustee, and on

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that ground alone. Looking to all the circumstances of this case ; the time that has been suffered to elapse,—the good price for which the land has been sold, and the waste and injury it has since undergone, I should doubt the propriety of simply rescinding this sale, even at the instance and special prayer of the defendants themselves. But I can see no good reason why the petitioner, *B. R.* should have it vacated, or why he should be released from the responsibility to which he voluntarily, and with a perfect knowledge of all circumstances, has subjected himself. In allowing himself to be reported, and his bonds to be returned here, as the purchaser, when, in truth, he was not the purchaser, he practiced an imposition upon this court ; and in availing himself of the form of the action at common law, in the name of the administratrix of the late trustee, *Samuel Richardson*, because his bond had been so made payable, to procure a receipt in full for the purchase money from the nominal plaintiff in that action, when, in truth, he had paid no part of it, for the purpose of preventing a recovery, he practiced a fraud upon the agent of the court, and an imposition upon the court of common law. Surely he who comes here openly avowing all this, ought to be allowed again to shore by justice, to baffle the court, and to scoff at the law. Under all such circumstances, *to set aside this sale* would be to allow a man openly to profit by his own wrong ; it would be to make that sound general rule of equity, which prohibits a trustee from becoming a purchaser at his own sale, a direct instrument of gross fraud. Whereupon, it is ordered, that the petition of *Benjamin Richardson* be, and the same is hereby dismissed with costs.

And upon the report and representation of the said trustee, it is further ordered, that the said *B. R.* the purchaser, and *A. J.* and *W. R.* his sureties, forthwith pay to the said trustee, or bring into this court, the whole amount of the said purchase money now due, together with legal interest thereon, or shew good cause to the contrary, on the first day of September next. Provided a copy of this order be served

on the said *B.*, *A.* and *W.* on or before the last day of this month. And it is further ordered, that the said trustee give notice to the creditors of the said late *Arthur Rider*, by causing a copy of the following order to be published in some newspaper, twice a week for three successive weeks, before the 20th day of August next: and that the creditors of the late *Arthur Rider* file their claims, together with the vouchers thereof, in the chancery office, on or before the 20th day of November next.”

From which order the said *B. and W. R.* on the 17th day of August, 1829, prayed this appeal.

The cause came on to be argued before BUCHANAN, Ch. J., ARCHER, and DORSEY, J.

Speed, for the appellants, contended,

That the proof showed the sale of the property mentioned in the proceedings, was made by the trustee, *Samuel Richardson*, to himself, and *Abraham Jarrett* the complainant in the bill, through the agency of the appellant, *Benjamin Richardson*: that the trustee, in pursuance of that sale, took possession of the property, and retained it until his death: that *Jarrett*, after the death of the trustee, entered and kept possession of the same property until the second sale mentioned in the proceedings: that the petitioner, who seeks relief in this case, never had possession: that the sale was not finally ratified until the 28th of August, 1828: that *Jarrett* had sold his interest in the proceeds of the property, and that the purchaser from him was not a party: that *William Richardson*, one of the appellants, has improved the land, and greatly increased it in value, since the sale. These positions of fact, he contended, were established by the evidence in the cause. He said the sale made by the trustee to himself, through an agent, was void, not voidable; and that the heirs of *Rider*, the original defendant, never having acquiesced in that sale, it was void,

and gave the present trustee, *Jones*, no right to claim the purchase money upon that sale. That the fact of the sale being public, a fair price being obtained, and even if the sale had been ratified in season, would not alter the rule of the Chancery Court. *State vs. Reed*, 4 *Harr. and McHen.* 11. *Davis vs. Simpson*, 5 *Harr. and Johns.* 147. *Sinstack vs. Harding*, 4 *Harr. and Johns.* 186. *Davou vs. Fanning*, 2 *Johns. Chan. Rep.* 252. He contended there had been no acquiescence in the original sale, on the part of the defendants: that the first trustee, and the complainant, had managed the property among themselves: that for five years there had been no trustee, in fact, and the original parties never notified of the fraud, and therefore never in a situation, nor called upon to acquiesce: that this petitioner was not too late to contest the validity of his purchase with *Jarrett*: he had always opposed the claim, whenever *Jarrett* attempted to enforce it against him, and had never acquiesced in it: that for these reasons, the decree of the Chancellor should be reversed. To sustain it, would only permit *Jarrett* to reap the benefit of a legal fraud, upon the practice and proceedings of the court, and that in fact, he was the only party in interest before the court, as complainant. The trustee, *Jones*, was acting for his benefit, or of those who took the demand, subject to subsisting equities against him.

Taney, (Attorney General U. S.) *Gill*, and *Alexander*, for the appellees, contended, that as to *William Richardson's* appeal, it must be dismissed. In relation to him, the decree was a mere order to pay the purchase money into court by a given day, or shew cause to the contrary, on or before that day. Such an order settled no right in relation to him. Upon showing cause, he might avail himself of any meritorious, or even technical objection to his paying the money. As to the effect of such orders, they cited, *Anderson vs. Foulke*, 2 *Harr. and Gill*, 373. Upon the question of appeal from such an order, at once, upon its being passed,

they cited, *Hagthorp vs. Hook*, 1 *Gill and Johns*. 270. *Daniels vs. Taggart*, *Ib.* 311. The only inquiry here is, whether the chancellor had *prima facie* grounds for passing such an order. We contend he had. The report of *Jones*, the trustee, discloses, that to the bond for the purchase money in this case, *William Richardson* was a party obligor. He was also the administrator *d. b. n.* of *Samuel Richardson*, the first trustee. Under such circumstances, an action at law upon, which must necessarily be in the name of the appellant, could not be resorted to. Even if the action could have been maintained, he could not have been induced to sue himself. A resort to equity was manifestly necessary. The facts fully justified the Chancellor's order. Although it is insisted here, that *William Richardson's* appeal must be dismissed, yet the only motive for dismissing it, would be to prosecute the Chancellor's order. It has been objected here, that the Chancellor could not enforce that order, and compel the appellant, *William R.* to pay the bond for which he is surety, by attachment, &c.; that over a mere surety he has no jurisdiction; that the bond is his contract, and he cannot compel the payment of that; the remedy is at law: we answer to that, our remedy at law is gone; the position which *W. R.* now occupies, as *ad. d. b. n.* of the first trustee, denies us that right. Upon general principles, then, we may resort to Chancery to counteract the effect of the appellant's own proceedings, and obtain relief, which we could not procure in a court of law.

The remedy which we seek against *W. R.* will also prevent litigation. His contract shews that he was covenanting with an officer of the Court of Chancery; his bond refers to the original proceedings in this cause, the sale under the authority of the court. The object of Chancery, is to give relief; to grant full and complete redress. The original complaint was within its jurisdiction. This incidental right, upon which granting relief at last depends, the right of enforcing its contracts, ought not to be refused: that would strip the court of its natural and appropriate

power : to refuse it, would be to place the court at the feet of other tribunals. Convenience sanctions this mode of redress. There is no fact in this case, which requires the intervention of a jury. The sealed contract of the party admits the debt. The relief to which *W. R.* is entitled, if any, is in equity, and that must be the case with all securities who occupy his situation. What sound principle, then, denies jurisdiction to the court to enforce this contract, and thus put an end to litigation? The practice under *English* chancery sales, furnishes no light here ; nor do we know of any instance in which our Court of Chancery has actually exercised the power. But considering it fit and reasonable that the court should possess it, we claim it for that tribunal, as essential to that forum which grants full relief, by giving a complainant the fruits of his demand, the money. 2. We contend that a party who purchases at a trustee's sale, with a full knowledge of what he is doing, cannot have that sale set aside. That if the same party so far affirms the sale, as to give his bond with security for the purchase money, that is an additional reason, why he should not have the power to set the sale aside. If such a power exists in the purchaser, while all the parties to a cause are satisfied, a court of equity never can be certain that a sale has been made. There can be no such general rule ; there must be some peculiar equity to sanction such an application ; some defect of title, some misrepresentation, some fraud ; a case in which a purchaser bids in one thing, and is about to get something else. The pretended equity here is, that *William Richardson* purchased for another, and not for himself.—That his principal was the trustee, whose duty it was to make the sale. That as a trustee cannot buy, so, neither can he employ an agent to buy, for him. We do not deny, that as a general position, it is true that a trustee cannot, and ought not to purchase at his own sale : good policy forbids such an act. He is not to be tempted to turn his duty to his own profit. The object and sole design of this rule is to protect the *cestui que trusts*. If they do not complain, the law presumes

that there is no ground for complaint; for though the law forbids a trustee to buy at his own sale, it is yet true, that he may give a full and fair price for the property, and thus the interests of the *c. q. t.* be as safe under his purchase, as any other. These considerations have established the rule, that if a trustee purchases for his own benefit, the sale is good till set aside by *c. q. t.* who alone has the right to object. *Wilson vs. Troup*, 2 Cowen, 195. *Lester vs. Lester*, 6 Ves. 631, (a.) *Campbell vs. Walker*, 6 Vesey, 678. This appellant claims through his principal. To the same extent we conceive he has rights, but no further. The *c. q. t.* do not object here: the sale is therefore valid. But again; an application to set aside a trustee's sale, must be made in a reasonable time. 1 *Cain's Cases in Er.* 1. *Chalmers vs. Bradley*, 1 Jac. and Walk. 59. *Wilson vs. Troup*, 2 Cowen, 195. It appears here, from the answer of *Arthur Rider, jr.* the only *c. q. t.* who asks the court to set aside the sale, that he has long known of these transactions. The sale took place on the 25th February, 1817: the petition to set the sale aside, was filed in June, 1829; after a lapse of twelve years, can such an objection, even from *c. q. t.* be listened to? We contend that the delay has been most unreasonable. It appears, however, from the proof, and the evidence is not contradicted, that the property sold, has been greatly deteriorated; from 2 to 500 cords of wood have been cut off the land. The court cannot do justice by vacating this sale. If it could restore the parties to their original rights, and give them the same property, in substantially the same condition, as when sold, the court might, with some color of justice, rescind the sale, but that now is impracticable.

The decree in *Harford County Court* is no bar, it is not relied on as estoppel in the petition. *Neafie vs. Neafie*, 7 Johns. Ch. R. 1. The petition, to be sure, states the fact, but not by way of estoppel; but as the attitude of the parties is changed, the decree referred to, would not have constituted a bar if pleaded as such. If a defendant, in whose

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favor a bill has been dismissed, thinks proper himself, to bring the same matter before the court, he may do so ; and then, the plaintiff in the first bill, is entitled again to be heard by the court. 3. The high Court of Chancery, and the *Harford* County Court, in the exercise of its equity jurisdiction, are courts of concurrent jurisdiction, and as the proceedings originated in the former tribunal, the latter should not have taken cognizance of it. The trustee who made the sale was the officer of the Court of Chancery, and his conduct as such, was not a subject for inquiry in *Harford* County Court.

Johnson, in reply.—This case is not to be decided as though *Benjamin Richardson* alone, was asking to vacate the sale ; the new trustee, *Jones*, may be considered as uniting in the application. *Samuel Richardson* was the actual purchaser. The answer of *Jarrett* shews, that he joined merely to enable *Samuel Richardson* to pay the purchase money, and without any view himself of becoming interested in the property. *Benjamin Richardson* was treated by *Jarrett*, as a party having no interest in the purchase. There can be no doubt that shortly after the sale, and at any time before ratification, the Chancellor would have vacated the sale upon the application of the heirs of *Rider*, whether it was beneficial, or otherwise. The sale was not ratified until August, 1828, before which, acquiescence cannot be imputed to the parties. One of the objects of the petition of *Benjamin Richardson*, was to vacate the sale, and have the bond for the purchase money given up ; it also called on *Jones*, the trustee, to report. The order of the Chancellor is in conformity with the prayer of the report filed by *Jones*, except that part which dismisses the petition of *Richardson*. The Chancellor erred in affirming in 1829, the sale made in 1818. No assent on the part of *Rider's* heirs is proved, nor is it shown that they acquiesced with a knowledge of the circumstances, without which they cannot be affected with the consequences of acquiescence. 3 *Harr. and Johns.* 410.

The ground upon which a party is precluded from objecting to a sale after acquiescence, is that it would be a fraud upon the purchaser, who may have gone on to put expensive improvements on the property ; but here, so far from improvements, the property has deteriorated. The record exhibits no creditor but *Jarrett* ; and *Rider's* heirs, consequently, are the only *cestui que trust*, and to them acquiescence is not to be imputed. Now, as these heirs unite with the purchaser in the application to vacate the sale, there does not seem to be any valid objection to it. If, however, the sale be valid, still the Chancellor erred in ordering the purchase money to be brought into court in this summary way. This cannot be done when the purchaser has given bond with security, to the trustee. The rule is general, that a legal remedy supersedes the jurisdiction of Chancery ; the principle upon which the right of the court summarily to order the purchase money to be brought in rests, is, that before bond is given, legal proceedings cannot be instituted to enforce its payment. Courts of law cannot be resorted to, to enforce the decrees of a tribunal of competent jurisdiction, having authority itself to compel obedience to its own judgments. *Anderson vs. Foulk*, 2 *Harr. and Gill*, 364. 3 *Barn. and Ald.* 52. 5 *Serg. and Low*, 225. But suppose the purchaser himself, who has bonded, is subject to be dealt with in this summary way, still it is contended, that his securities cannot be ; if such an order can be passed against them, it may be enforced by attachment, which is founded alone on a contempt of the court. The securities cannot be guilty of a contempt, because they enter into no engagement of any sort with the court ; their contract is contained in, and is evidenced by the bond, which the trustee alone can enforce, by a proceeding at law. If sureties in a bond of this description are subject to attachment, then securities in injunction bonds may be treated in the same way, and thereby the right of a trial by jury would be denied to them. The appeal was not prematurely taken, though the order to bring the money into court, or show

cause, was not final; still the validity of the sale was conclusively settled, and the rights of the parties, in that particular, finally adjudicated upon.

BUCHANAN, Ch. J., delivered the opinion of the court.

We entirely concur with the Chancellor, in the view he has taken of the wily conduct of *Benjamin Richardson*, the appellant, whose whole course in relation to the subject of his petition, bears upon the face of it, the deep impress of trick and fraud; and in his refusal to set aside the sale, and exonerate *Benjamin Richardson* from his responsibility for the purchase money of the land, to which he had become subjected, by lending himself as a cover, to the violation of his duty, by an unfaithful trustee.

The policy of the law forbids, that a trustee shall become a purchaser, directly, or indirectly, at his own sale, and if he does, such sale may, and will be set aside, on the proper and reasonable application of the parties interested. In this case, *Benjamin Richardson* alleges in his petition, that he became the purchaser of the land at the instance, and for the exclusive benefit of *Abraham Jarrett*, and *Samuel Richardson*, a trustee appointed by the Chancellor, for the sale of it. Thus shewing, that although the purchase was nominally by him, the trustee was, with another, virtually the purchaser at his own sale. And upon that ground, and charging also a fraudulent collusion, between *Jarrett* and the trustee, to whose abuse of trust he admits that he lent himself as a cover, seeks to have the sale vacated; not for the benefit of any whose interest it was that the land should be sold to the best advantage, but to rid himself of a liability in which he has been involved by his own improper conduct. Every step he appears to have taken throughout the whole of his devious course, in connexion with this subject, merits the reprobation, rather than the favorable consideration, of a court of equity. The rule, that a trustee shall not become a purchaser at his own sale of the trust property, was not adopted in favor of trustees, but for the protection of the

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interest of the *cestui que trust*. It is not, therefore, on the application of a trustee, to be relieved from his purchase of trust property at his own sale, that Chancery will interpose to set aside such sale. It is only done in behalf of those who are interested in the faithful execution of the trust. To vacate a sale by a trustee, at which he was himself the purchaser, either directly or through the agency of another, (merely on the principle that a trustee shall not become a purchaser at his own sale,) on the application either of such agent, or of the trustee, whenever it may be found convenient, or to his interest, to get rid of the purchase, would be an abuse of the rule to the prejudice of the *cestui que trust*; and in the emphatic, and very appropriate language of the Chancellor in this case, to make the rule, “a direct instrument of gross fraud.” The order therefore, of the Chancellor, so far as it relates to the dismissal of the petition of *Benjamin Richardson* with costs, will be affirmed. But so far as it directs *Benjamin Richardson*, and *Abraham Jarrett*, and *William Richardson*, his sureties, to pay the purchase money to the present trustee, or bring it into court, or show cause to the contrary, it is purely interlocutory, and professes to settle nothing between the parties; but affords them an opportunity to show, if they can, that they are not bound to pay, or bring the money into court as directed, and is not as to that matter, an order from which an appeal will lie. But as doubts are entertained whether a purchaser at a trustee’s sale, who has given bond for the purchase money, can regularly be compelled in this summary way, to pay, or bring the money into court; and a desire has been suggested by counsel, after argument, that we should express an opinion on the question; in order that it may be put at rest, we will very briefly present our views of the subject. Where a sale is made under a decree or order in Chancery, and no bond or security is given for the payment of the purchase money, a practice has grown up in Chancery, and sanctioned by this court, in *Anderson vs. Foulke*, 2 Harr. and Gill, 346, to compel the purchaser to complete his purchase, by

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an order on him in a summary way, to pay or bring the money into court, and that from necessity arising out of the peculiar character of such transactions. No action at law will lie to enforce a decree in Chancery, within the territorial jurisdiction of the Court of Chancery. An order of the Court of Chancery ratifying such a sale, is considered as amounting to a decree for the payment of the money; and if that court could not enforce the execution of it, it could not be enforced at all. Before ratification the trustee cannot sue, because until ratified, the sale is not complete and binding; the contract is not perfect—nor can he sue at law after the ratification, because it thereby becomes a sale by the court; a contract with the court; and being but an agent, he cannot sue on a contract between the vendee and the court, and not a contract made and concluded with himself, and the order of ratification vests him with no authority to sue at law for the enforcement of the contract. There is, therefore, in such a case, no person to sue at law, if an action at law would lie to enforce a decree or order in Chancery, and the remedy must be in Chancery. But it may be asked, whence Chancery derives the authority to proceed in a summary way, by order, to enforce the payment of the purchase money; and why not proceed by bill in equity? The answer to which is, that a Court of Chancery having a clear right to enforce its own decrees, and an order of ratification being considered as amounting to a decree for the payment of the purchase money, a purchaser who neglects or refuses to comply with such decree, is in contempt, and may be dealt with accordingly, by an order in the first instance, (in this State) to bring the money into court, as preparatory to an attachment. And that looking to an order of ratification, as amounting to a decree for the payment of the purchase money, there is no reason for requiring a proceeding by bill, to compel a compliance with such a decree, which would not apply to any other decree; and that such a course of proceeding would lead to endless and unnecessary circuitry, without any beneficial result.

But where a bond is given to the trustee for the purchase money, under an order of sale from Chancery, requiring bond to be given, the terms of sale are complied with, and a contract entered into, not with the court, but the trustee, on which, after ratification, he has a full and perfect remedy at law, for enforcing the payment of the purchase money, that is recognised and sanctioned by the order of ratification, which, in such case, is not a decree for the payment of the purchase money, but a confirmation only, of what has been done. And though the contract of sale, being perfected by the order of ratification, it is thereby said to become a sale by court, yet the terms of sale being complied with, and the purchase completed, by giving to the trustee as required, a bond to secure the payment of the purchase money, the purchaser is not in contempt by the non-payment of it. The contract on the bond not being with the court, but with the trustee, under the sanction of the court, and the remedy is by suit on the bond in a court of law; and Chancery cannot enforce it, as a mere bond for the payment of money, by which the original simple contract of purchase is extinguished. And if the payment of the bond, as such, cannot be enforced by a bill in Chancery, *a fortiori*, can it not be enforced in a summary way, by an order to bring the money into court. There must be a decree, or order of ratification amounting to a decree, for the payment of the purchase money, as a foundation for an order to bring it into court. It is not merely on the ground, that the purchase money is remaining unpaid, that such an order is passed, but it is on the principle that there is a decree, for the payment of the purchase money, and the purchaser being in contempt, the order has for its object the enforcement of that decree. Where there is not such a decree, there can be no such order; and an order of ratification sanctioning and confirming a contract of sale, by which bond and security is given for the payment of the purchase money, cannot we think, be construed to amount to a decree for the payment of it. Where the sale is a cash sale, the order of ratification is held to amount

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to a decree for payment, which must be enforced in Chancery, there being no remedy at law. But where it is not a cash sale, and bond is given for the purchase money, the order of ratification adopts the bond, which stands in the place of a decree for payment, and is a legal contract, to be enforced at law. Every difficulty has, in this case, been thrown in the way of the recovery of the purchase money by the appellant, *Benjamin Richardson*; and by lapse of time, and otherwise, the subject is surrounded by some embarrassment. But he cannot expect to avail himself of a lapse of time, brought about by his own improper conduct; and there is no doubt, that under the peculiar circumstances of the case, the trustee, *Stephen Jones*, may by a bill properly framed, and against the proper parties, coerce the payment of the purchase money still due.

DECREE AFFIRMED, AND APPEAL FROM THE INTERLOCUTORY ORDER DISMISSED.

JOSEPH KOLB vs. ANTHONY WHITELY, Trustee of D. TROWBRIDGE and J. TAYLOR.—*December, 1831.*

Where A and B, who were partners in trade, became embarrassed about the 17th March, and on the 27th applied for a discharge under the insolvent laws, and where, as between the permanent trustee of the insolvents and the defendants, the inquiry was, whether a certain transfer of property made by the insolvents, on the 19th, to the defendant, then a creditor, was made with a view, or under an expectation of being or becoming insolvent debtors, *it was held*, that for the purpose of enabling the jury to find when the intent to seek relief under the insolvent laws originated, declarations of one of the insolvent partners, made a few days before the 20th, that if certain creditors came on them, they must stop payment, or petition—that bills of sale of household furniture executed by them on the 21st, and declarations of one of the insolvents, made at the same time, that the grantee therein (who was not the defendant,) had advanced money to the partners, and they wished to secure him in consequence of the situation they were placed in,—and that entries in the day book of the insolvents, dated the 19th, 20th, 21st and 23d, shewing a delivery of goods and notes to various persons, and among others, to the defendant, were all

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competent evidence for that object, as surrounding circumstances of the transaction, and a part of the *res gestæ*.

When declarations of persons, not parties, to a suit, constitute a part of the transaction under investigation, they are admitted in evidence to show its character, or the speaker's intention.

In an action by the permanent trustee of an insolvent debtor, under the system for the City and County of Baltimore, it is not necessary to produce an assignment from the provisional trustee to him, of the insolvent's effects, nor to show that a majority of the insolvent's creditors recommended him to the commissioners of insolvent debtors as permanent trustee, to support his right to sue in that character.

PER HARFORD COUNTY COURT.

APPEAL from *Harford County Court*.

This was an action of *Trover* for a quantity of leather, which originated in *Baltimore County Court*, on the 21st of April, 1829, and was afterwards removed to *Harford County Court*, upon a suggestion, according to the act of assembly.

The appellee in this court, was the plaintiff in the court below—issue was joined upon the plea of not guilty.

1. At the trial the plaintiff offered to read in evidence to the jury, the records of the proceedings of *Baltimore County Court*, except certain interrogatories contained therein, upon the applications of *Trowbridge* and *Taylor*, dated March 27th, 1829, for the benefit of the insolvent laws, by which it appeared that said *Trowbridge* and *Taylor* were discharged by the said court, upon the report of the commissioners of insolvent debtors for the city and county of *Baltimore*, and that the appellee was appointed their permanent trustee, and gave bond with approved security, as such, on the 4th of April, 1829; for the purpose of proving that the said appellee was the duly appointed permanent trustee of said insolvents, and entitled in that capacity, to sue for their effects and rights. To the competency of which evidence for that purpose, the defendant objected, unless the plaintiff first produced an assignment to him from the provisional trustee, mentioned in said proceedings; and unless the said plaintiff also proved, that he was appointed upon the recommendation of a majority in amount of the creditors of the insolvents. But the court [KELL, A. J.] over-

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ruled the objections, and permitted the proceedings for the purpose aforesaid, to be read to the jury—the defendant excepted. This exception was abandoned in the argument.

2. The plaintiff then proved that the insolvents were curriers and partners on *Cheapside*, in the city of *Baltimore*, before and during the month of March, 1829. That *Kolb*, the defendant, occupied a warehouse next door to them, and was also a currier, and that the witness a day or two before the 20th of March, 1829, was in the currying shop of *Trowbridge* and *Taylor*, and they had therein a stock of leather, which the witness, (who was also a currier) from the appearance of the stock on the shelves, supposed to be worth \$1200 or \$1500, and that he was not in the cellar of their store. That on the morning of the 20th of March, the attention of the witness was attracted by the circumstance, that at the back door of *Trowbridge* and *Taylor's* store, a dray was loading with leather, which was taken out of the cellar of the store, and was of various kinds. The dray was laden in a hurried and unusual manner, calculated to injure the leather, the quantity of which upon the dray, was worth from \$200 to \$300, and was taken off, the witness knew not where. That it did not stop at the store occupied by *Kolb*. That in the course of the same morning, witness was called upon to appraise the value of the leather in *Trowbridge* and *Taylor's* shop. That the rent claimed from them was about \$75, and after including the tools, &c. there was little more leather in the warehouse than was sufficient to pay the landlord's claim. That whilst the appraisement was going on, the defendant came to the warehouse, and wanted the appraisers to value the articles higher than they were appraising them at; and that when the appraisers were proceeding to the upper story to find other property, that on the lower floor not being sufficient, defendant interfered, and claimed to be the owner of the leather up stairs. The appraisers, however, went up stairs, and after they had there discharged their duty, they were called down, when defendant paid the landlord, and took the

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leather at the appraisement, and the key of the warehouse, observing that if *T. and T.* would refund him the sum he had advanced for the leather, they might have it. That on the same day, *Kolb*, the defendant, came to the store of witness, when upon being asked if he was a creditor of *T. and T.*, he replied that he was not then a creditor—that he had been satisfied in leather, &c. and had given them up their notes, which amounted to from \$500 to \$600. He did not say when he had received the leather. The witness was told by said *Kolb*, at a subsequent time, that he had received a letter from *Whitely*, the plaintiff, as trustee of *T. and T.*, requesting him to come up and settle his claim against him. *T. and T.* were in good credit until one *Myers* absconded from *Baltimore*, which was, the witness thought, from eight to ten days before the 20th of March, and then it was generally known that *T. and T.* were affected by *Myers'* affairs. The plaintiff proved by another witness, that defendant called on him (the witness) within a day or two after the 20th March, and stated, that the insolvents had been indebted to him, but that they had satisfied or paid him, and he invited the witness in his shop to look at some calf skins, which had the appearance of having then been recently moved, not being dry. The plaintiff further proved, that about the time he was appointed trustee, the defendant, in a conversation with another witness, about the affairs of the insolvents, expressed his determination to hold on to the leather he had got from them; which conversation being communicated to plaintiff, he wrote and sent the following letter to defendant: "*Mr. Joseph Kolb,—Sir—From the books of Trowbridge and Taylor, I learn that a considerable amount of stock was handed over to you by said T. and T. immediately previous to, or about the time of their application for the benefit of the insolvent laws. It becomes my duty as trustee for the creditors, to seek to recover said stock, as the property belonging to the estate of insolvents. I therefore respectfully notify you to deliver over the said stock and property to me, in order that the*

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same may be fairly distributed amongst the creditors of said insolvents. Yours respectfully, A. *Whitely*, trustee. April 10, 1829.” Which the defendant, upon its being handed to him, opened and looked at, and then threw it into the street, telling the bearer of it, that if the writer was there, he would serve him in the same manner. The plaintiff further proved, that *Myers* absconded on the 17th of March, 1829, and came back to *Baltimore*, and was arrested and sent to prison on the night of the 23d of March, and that *T.* and *T.* were jointly responsible with him on various notes to a large amount, in the possession of the *Mechanics’ Bank* and others, and that a note on which they were endorsers, was protested on the 19th of March, 1829, and notice given to them on that day. The defendant proved that the insolvents paid a note which became due on the 15th March, 1829, and that *Myers’* estate divided twenty-five cents in the dollar, and will divide five cents more, and that the plaintiff, as their trustee, had not demanded or received any dividend on the estate of *Myers*. The plaintiff then proposed to prove, that some few days before the 20th March, 1829, *Daniel Trowbridge*, of the house of *T.* and *T.* informed the witness, that if *Myers’* creditors came on them, they must stop payment or petition, though they had enough to pay their own debts, and that they were endorsers on *Myers’* paper to a large amount. The defendant objected to the admissibility of this evidence, for the following reasons. 1. That no declarations of the insolvents, after the alleged delivery of leather by them, are admissible for the plaintiff. 2. That no declarations before the time of delivery of the leather, are admissible for plaintiff. 3. Because the said declarations do not appear to have been made at the time of the said delivery of leather, nor with reference thereto. But the court admitted the said declarations, and instructed the jury, that if the said declarations were made by *Trowbridge* anterior to the time of delivery to *Kolb*, (if there was such a delivery,) that then they might consider the same in forming their opinion, whether the said *T.* and

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T. at the period of said delivery, delivered the same with a view, or under an expectation of becoming insolvent debtors. The defendant excepted.

3. The plaintiff then proved that the defendant, since the commencement of this suit, said, that he had got leather for his claim against *Trowbridge* and *Taylor*—that he had tried to save himself, in doing which, he had done no more than other people would do in similar circumstances: and also read in evidence two bills of sale, executed by the respective insolvents, on the 21st of March, 1829, to *Reuben Trowbridge*, conveying to him a variety of household furniture: and offered to prove, that *John Taylor*, one of the insolvents, on the date of the execution of the bills of sale, informed the conveyancer, that *Reuben Trowbridge* had advanced money to them, and that they wished to secure him, in consequence of the situation they were placed in by *Myers*, and that they would have to petition. To the competency of the bills of sale, and the information derived from said *Taylor*, the defendant objected. But the court overruled the objection, and permitted the evidence to go to the jury, for the purpose of showing that the insolvents were dispossessing themselves of their property, and for the purpose of enabling the jury to ascertain when *T.* and *T.* first had in view, or were under an expectation, of being or becoming insolvent debtors. The defendant excepted.

4. The plaintiffs then, for the sole purpose of showing that the insolvents, on the 19th, 20th, 21st, and 23d of March, 1829, were dispossessing themselves of their property generally, with a view, or under an expectation, of being or becoming insolvent debtors, and to enable the jury to fix the time at which such view or expectation originated, offered to read in evidence certain entries in the day book of the insolvents, which it was admitted were genuine, by which it appeared that at those dates, they transferred to the defendant and others, a large amount of goods, and received payment chiefly in

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their own paper. To this evidence the defendant objected upon the ground, that the said entries were inadmissible; and also, that they ought not to be read, unless the names of the parties attached to them, and particularly that of *Joseph Kolb*, should be omitted: but the court permitted the entries to be read for the purpose aforesaid. The defendant excepted, and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J., STEPHEN, and DORSEY, J.

Krebs, for the appellant, contended, 1. That the declarations of the insolvents, offered in evidence by the plaintiff, were inadmissible; *first*, because they were interested in the success of plaintiff, as a recovery by him would swell the fund for distribution among their creditors: or, *second*, they are to be regarded as strangers, and their declarations consequently, merely hearsay. For the exceptions to the rule, forbidding the admission of hearsay, as evidence, he cited 1 *Philips' Ev.* 186, &c. He argued that the insolvents and the appellant, stood to each other in the relation of vendor and vendee. The insolvents are the vendors, and their declarations, made prior to the sale, might be evidence against the vendee, because then they spoke against their interest. *Dorsey vs. Dorsey*, 3 *Harr. and Johns.* 410. It is not so, however, in reference to declarations made after the sale. 1 *Serg. and Rawle*, 526. The declarations of a bankrupt, as to past transactions, which have have been consummated, are not admissible. 1 *Saund. Pl. and Ev.* 303. 1 *Phillips' Ev.* 219. 4 *Esp. Rep.* 233. 1 *Ib.* 255. 12 *Serg. and Rawle*, 328. 14 *Massa. Rep.* 245. 12 *Ib.* 5 *Johns. Rep.* 413. He contended also, that the bills of sale, and the entries in the books of the insolvents, were altogether inadmissible. For the purpose of showing that the insolvents were interested in promoting the plaintiff's success, he referred to the *act of 1805, ch. 110, sec. 10*, by

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which, a creditor who takes from an insolvent debtor a collusive transfer, forfeits his debt.

Johnson and *Gill*, for the appellee. The single question is, upon the admissibility of the evidence. That the transfer was made with a view to insolvency, is not made a question. The defendant does not claim title to the property as a purchaser, but as a preferred creditor; and the County Court merely decided, that declarations made by the insolvents, showing that at the time of the transfer, they contemplated becoming insolvent, and designed to give an undue, and improper preference, to the defendant, were evidence. The declarations so made, are certainly evidence to show indebtedness at the time, as would judgments against, or promissory notes given by, the insolvents. If not, then their petition, and record of discharge, would not be evidence for the same purpose. They contended that the rules of evidence, adopted in reference to the bankrupt system of England, were not applicable to our system of insolvency, which contemplates that the acts of the insolvent, previously to his petition, will manifest his design to do so. His acts and declarations, are part of the *res gestæ*. 1 *Stark. Ev.* 46, 7 *sec.* 28. *Ib.* 48, *sec.* 29. To show that the intention of the insolvent might be inferred from his acts and declarations, they cited 5 *Harr. and Johns.* 97.

STEPHEN, J., delivered the opinion of the court.

This is an action of *Trover*, instituted by the appellee, as trustee of *Trowbridge* and *Taylor*, to recover from the appellant certain property, transferred by *Trowbridge* and *Taylor* to the appellant, who was their creditor at the time they became insolvent. In the course of the trial of the cause, the plaintiff offered in evidence certain declarations of one of the insolvents, a short time prior to the transfer, relative to the pecuniary embarrassments of the firm, and also certain entries in their day-book, for the purpose of showing that they were dispossessing themselves of their property,

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generally, with a view or under an expectation of becoming insolvent debtors, and to enable the jury to ascertain the time, when such view or expectation originated; a part of which entries went to show that they were disposing of large quantities of leather, part of their stock in trade, and of which article they were manufacturers. To the admissibility of these declarations and entries, the defendant, by his counsel objected, but the court overruled the objection and suffered the testimony to be given to the jury; the defendant excepted, and whether or not such testimony was legally admissible for the purpose for which it was offered, is the question, which this court is now called upon to determine. The insolvents applied for the benefit of the insolvent laws on the 27th of March, 1829; on the 20th of March of the same year, the transfer of the leather was made to the defendant, for which this action was brought. (Here the Judge adverted to the bills of exceptions, and then said.) By an act of the General Assembly, passed in 1816, *ch. 221, sec. 6*, it is enacted, “that all deeds, conveyances, transfers, assignments, or sales of any property, real, personal or mixed, or of any debts, rights or claims, to any creditor or creditors, security or securities, which have been, or shall hereafter be made by any person, with a view or under an expectation of being or becoming an insolvent debtor, and with an intent thereby to give an undue and improper preference to such creditor or creditors, security or securities, shall be absolutely null and void.” And it further provides, that such property shall vest in the trustee of the insolvent debtor, as effectually as any property specified in his schedule. To enforce the provisions of this section, and to recover the property transferred, was the object of this suit. It became necessary, therefore, to prove to the jury, that at the time of the transfer and delivery of the property to *Kolb*, the insolvents contemplated becoming insolvent debtors; and to establish that fact, the entries and declarations were offered in evidence. The rule is well settled, that where the expressions heard, constitute a part of the transaction,

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they are admitted to show its character, or the speaker's intention ; as the declarations of a trader on leaving home, to show an act of bankruptcy, 2d *Saun. P. and E.* 66. Hearsay is often admitted in evidence, as part of the *res gestæ* ; the meaning of which seems to be, that where it is necessary, in the course of a cause, to inquire into the nature of a particular act, and the intention of the person who did the act, proof of what the person said at the time of doing it, is admissible evidence for the purpose of shewing its true character. Thus, for example, in an action by the assignees of a bankrupt, the bankrupt's declarations, at the time of his absenting himself from home, are properly received in evidence, to show the motives of his absence. In the case of *Bateman vs. Bailey*, therefore, where the question was, whether the trader's departure from his dwelling house, amounted to an act of bankruptcy, the Court of *Kings Bench* were of opinion that the reasons which he gave for his absence, after his return home, ought to have been admitted in explanation of his own act. 1st. *Philips' Ev.* 202. What a bankrupt said at the time of his doing an act, alleged as the act of bankruptcy, is receivable in evidence as being part of the *res gestæ*, and as evincing the intent with which the act was done, 1st *Saun. Plea. and Evi.* 68. Speaking on the subject of presumptive evidence, *Starkie*, in his treatise on evidence, 1 vol. 19, says, "The necessity of resorting to presumptive evidence is manifest. It very frequently happens that no direct and positive testimony can be procured ; and often when it can be had, it is necessary to try its accuracy and weight, by comparing it with the surrounding circumstances ;" so (p. 39) he observes, "From what has been said, it seems to follow that all the surrounding facts of a transaction, or as they are usually termed, the *res gestæ*, may be submitted to a jury, provided they can be established by competent means, and afford any fair presumption or inference, as to the question in dispute ; for as has been already observed, so frequent is the failure of evidence from accident or design, and so great is the temptation to

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the concealment of truth, and misrepresentation of facts, that no competent means of ascertaining the truth, can or ought to be neglected." "Hence it follows, that facts remote from and irrelevant to the issue between the parties, are inadmissible, for no presumption can safely be drawn from them; and if such evidence does not tend to prejudice and mislead the jury, at least, it unnecessarily consumes the time of the court. The evidence must be confined to the fact or point in issue." When A, the holder of a bill, deposits it with B, as security for the balance of accounts between them, and after it is due, B endorses it to C, in an action by C against A, the account book of B is not evidence in diminution of the balance between A and B, but a contemporaneous entry or declaration would have been admissible. *2d Saun. Plead. and Ev.* 557. So, "where the party against whom the evidence is offered, was privy to the act, the objection ceases, it is no longer *res inter alios*. And in general, where the evidence is offered as a mere fact which is connected with the matter in dispute, and not with a view to affect the party, otherwise than as the actual existence of the fact affects the nature of the transaction itself, then, although it was a transaction between others, yet as a mere fact, and part of the *res gestæ*, it is evidence." *1st Starkie, Ev.* 52. Here the evidence was offered as a mere fact connected with the matter in dispute, and not with a view to affect the party otherwise, than as the existence of the fact evinced the nature and character of the transaction. The declarations offered in evidence in this case were made by the insolvent immediately, or a few days preceding the transfer in question, and tended directly to prove his contemplated or apprehended insolvency, and the entries showing a disposition of their effects to particular creditors, were also facts not remote from, but contemporaneous with, and immediately preceding, and subsequent to, such transfer; they were, therefore, in the language of *Starkie*, part of the *res gestæ*; nor can such declarations or entries be considered as made from sinister motives, because there was then no

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controversy or *lis pendens*, in relation to the transfer, and the insolvents had no reasonable motives to misrepresent the truth.

We are, therefore, of opinion in this case, that the court below were right in receiving the declarations and entries as surrounding circumstances of the transaction, and a part of the *res gestæ*, showing the insolvent situation of the parties at the time, and that they contemplated becoming insolvent debtors, in consequence of the derangement of their affairs, and their utter inability to pay their debts.

JUDGMENT AFFIRMED.

JOHN T. HOXTON AND WIFE'S LESSEE vs. JOHN ARCHER,
et al.—Dec. 1831.

It is a general rule in the construction of wills, that a limitation which may operate as a remainder, shall not be construed an executory devise.

Tenant in fee, on the 8th May, 1775, devised as follows, "I give and bequeath the whole of my estate, both real and personal, unto my five daughters, to them and their heirs for ever, to be equally divided amongst them; and it is my will, that if either of the said children, die without issue lawfully begotten of their body, in that case, the part of the said child be equally divided among my surviving daughters." HELD, that this will being made before the act to direct descents, the devisees each took estates tail general, with cross remainders in fee, under the limitation over to the survivors.

It is a general rule, that where there are no particular and sufficient words used for that purpose, surviving shares in a devise of real property will not, upon the decease of one who took as a survivor, survive again.

APPEAL from Harford County Court.

This was an action of *Ejectment*, brought by the appellants, on the 21st February, 1829, against *John Archer*, *Herman Stump*, and *James Stephenson*, the appellees, to recover an undivided interest, in a tract of land, called *The Land of Promise*. The defendants pleaded not guilty, and took defence on warrant. The following statement of facts was submitted for the judgment of the court. "It is

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agreed in this case, that *Nathaniel Giles*, died seized of the tract of land for which this suit is brought, some time in the year 1775, having first made his will, legally executed to pass real estate, and which will is as follows:—"I, *Nathaniel Giles*, of *Harford* county, in the province of *Maryland*, being weak in body, but of sound mind and memory, do make and ordain this my last will and testament, in manner and form following, to wit: First, I give and bequeath unto my beloved friend *Tabitha Richardson*, £25 common money. *Item*, I give and bequeath unto my friend *Sarah Coale*, £15 common money. *Item*, I give and bequeath the whole of my estate, both real and personal, unto my five daughters, by the names of *Hannah*, *Sarah*, *Elizabeth*, *Caroline*, and *Charlotte*, to them, and their heirs for ever, to be equally divided amongst them; and it is my will, that if either of the said children, die without issue, lawfully begotten of their body, in that case, the part of the said child be equally divided among my surviving daughters. I do hereby make null and void, all wills made by me heretofore, &c."—this will is dated on the 8th May, 1775. It is further agreed, that the devisees named in the said will, were the only heirs at law of the said *Nathaniel Giles*, and entered upon the said land, and were duly seized thereof, and that *Charlotte*, one of the said devisees, died a minor, and without having been married, or having had issue. That afterwards a partition of said land was duly made, between the four surviving devisees; to wit, *Hannah*, *Sarah*, *Caroline*, and *Elizabeth*, and each entered upon the portion assigned to her by said partition. That afterwards, *Hannah*, *Sarah*, and *Caroline*, all died, each leaving issue, now living. That *Elizabeth*, after said partition, sold and conveyed the part of said land allotted to her, under such partition, to *John Stump*, by deed duly executed, acknowledged and recorded, which deed is as follows: "This indenture, made the 16th of May, 1797, between *Elizabeth Giles*, of *Harford* county, of the one part, and *John Stump*, of the said county, of the other part,

witnesseth, that the said *Elizabeth Giles*, for and in consideration of the sum of £750, to her in hand paid by the said *John Stump*, the receipt whereof is, &c. hath granted, bargained, sold, aliened, enfeoffed and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, and confirm, unto the said *John Stump*, his heirs and assigns, the following tract, or parcel of land, lying in the county aforesaid, and known in the division by the name of lot number three, and being part of a tract of land called *The land of Promise*, beginning, &c. to have and to hold, the aforesaid tract or parcel of land, and premises, with the appurtenances, unto the said *John Stump*, his heirs and assigns forever." And it was further admitted, that the title of said *Stump* is duly vested in the defendants. That said *Elizabeth* survived all the other devisees, named in the said will of *N. Giles*, and afterwards herself died in the year 1827, without issue, or having been married, and that the lessors of the plaintiff are the only heirs at law of *Sarah*, one of the aforesaid devisees. It is further agreed, that this suit is brought to recover an undivided moiety of that part of the land assigned as aforesaid, under the partition to *Elizabeth*. If upon these facts, the County Court should be of opinion that the plaintiffs are entitled to recover, then judgment to be entered for the plaintiff, for one undivided third part of *Elizabeth's* part of said land, or for such undivided part as she may be entitled to; but if the court should be of opinion that the plaintiff is not entitled to recover, then judgment to be rendered for the defendants. It is also agreed that either party may be at liberty to appeal from the judgment which may be rendered upon this statement, in like manner as if the facts herein stated, were stated in a bill of exceptions.

The County Court, with the consent of parties, gave a *pro forma* judgment for the defendants, and the plaintiffs appealed to this court.

When the case came on to be argued in the Court of Appeals, the following additional statement of facts was

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agreed to by the counsel: it was admitted, "that *Hannah, Sarah, and Caroline Giles*, three of the devisees of *Nathaniel Giles*, were living at the execution of the deed from *Elizabeth Giles* to *John Stump*. That *Charlotte Giles*, one of the devisees, died an infant, and without issue, before the year 1797. That *Hannah* died in 1813, *Caroline* in 1816, and *Sarah* in 1824, and that their children are the only heirs at law of *Elizabeth*.

The cause was argued before BUCHANAN, Ch. J., STEPHEN, and DORSEY, J.

Speed, for the appellant, contended,

1. That under the will of *Nathaniel Giles*, his daughter *Elizabeth* took an estate in fee simple, in an undivided fifth part of the real estate devised to her and her sisters as tenants in common, liable to be divested upon the contingency of dying without issue living at the time of her death.
2. That the devise over was good, as an executory devise for life; in support of these two points he cited *Gilbert on Wills*, 54, 5, 6. *Cro. James*, 590. *Cro. Eliz.* 52. *Woodward vs. Glasbrook*, 2 *Vernon* 388. *Metham vs. Duke of Devon*, 1 *P. Wms.* 534. *Forth vs. Chapman*, *Ib.* 663. *Target vs. Grant*, *Ib.* 432. *Porter vs. Bradley*, 3 *Term. Rep.* 145. *Daintry vs. Daintry*, 6 *Ib.* 307. *Roe vs. Jeffrey*, 7 *Ib.* 589. *Fosdick vs. Cornell*, 1 *John.* 440. *Anderson vs. Jackson*, 16 *John.* 382. *Clayton vs. Lowe*, 7 *Serg. and Low.* 218. *Morgan vs. Morgan*, 5 *Day. Ca.* 517. *Geering vs. Shenton*, *Cowper.* 410. *Newton vs. Griffith*, 1 *Harr. and Gill*, 124. *Doe vs. Webber*, 1 *Bar. and Ald.* 713, 720. 2 *Fearne*, 245. 4 *Com. Dig.* 170.
3. That at the time of the conveyance by *Elizabeth* to *John Stump*, in 1797, the estate was in perpetuity, and said conveyance was inoperative on the part she took under the first branch of the devise. *Scatterwood vs. Edge*, *Salk.* 229. *Gilbert on Wills*, 64, 66.
4. That the devise over being only for life, after the death of *Charlotte*, *Elizabeth* took a life estate in one

fourth part of her portion, under the first branch of the devise. 4 *Com. Dig. title devise No. 11*, 189. *Woodward vs. Glasbrook*, 2 *Vernon*, 388. *Jackson vs. Thompson*, 6 *Cowen*, 178. *Cro. Eliz.* 358, 2 *Merriv.* 133. *Hawley vs. Northampton*, 8 *Mass.* 3. *Holloway vs. Holloway*, 5 *Ves.* 401. 3 *Wilson*, 247. 1 *Bay*, 80. 5. If by the first branch of the devise, an estate tail only passed, the limitation over for life was good as a *remainder*, and *Elizabeth* taking one-fourth of *Charlotte's* part, as a remainder for life only, could pass no greater interest by the deed to *Stump*, and that life estate having determined by the death of *Elizabeth*, we are entitled to recover our portion of it, viz: *one third* as heirs of the reversion. 6. If *Elizabeth*, dying without issue living at the time of her death, never acquired an absolute fee, and none of the devisees over for life, being in existence to take at the time of her death, the estate reverted, and the plaintiffs, as heirs of the reversion, are entitled to recover one-third of the premises in question. 7. If *Elizabeth* acquired a fee simple *absolute* in the property she took, under the first branch of the devise, she died, seized thereof; and the plaintiff, as one of her heirs at law, has a right to recover one-third part of that property. 8. The estate being in perpetuity at the date of the deed to *Stump*, *Elizabeth*, by executing that deed, forfeited all her interest in the property, it reverted—and we, as heirs of the reversion, claim.

Johnson, for the appellee.

1. If at any period between the date of the deed from *Elizabeth Giles* to *Stump*, and her death, she acquired a title to the property conveyed, in fee simple or fee tail, no one claiming under her, can recover the property so conveyed; her deed would operate as an *estoppel*. *Fairtitle vs. Gilbert*, 2 *Term. Rep.* 172. 3 *Blac. Com.* 308. 2. The will of *N. Giles* created in his daughters and devisees, an estate tail general, with cross remainders in tail general to the survivors. If the devisees over, took but estates for life; then, upon the death of *Charlotte*, *Elizabeth* took for life, three-fourths of her share of

the estate, and as the inheritance belonged to the heirs at law of *Nathaniel Giles*, of whom *Elizabeth* was one, she was entitled to one-fourth of the fee, being entitled to a life estate, as one of the devisees over, and the inheritance, as one of the heirs at law of *N. Giles*. The partition vested in her a separate estate in her share, and this separate estate was transferred to *Stump* by her deed in 1797. This is clearly the case in relation to *Charlotte's* estate, and the same may be affirmed of her own, at the time of her death. In *Dallam vs. Dallam*, 7 *Harr. and Johns*. 236, it was decided, that the devise over would be construed to be remainder, unless the intention of the testator to the contrary, was perfectly apparent. In devises of real estate, the words dying without issue, or dying without leaving or having issue, mean an indefinite failure of issue, unless an opposite intention is manifest. *Newton vs. Griffith*, 1 *Harr. and Gill*, 115. The question whether a limitation over by way of executory devise is good, does not depend upon, whether the estate limited over must vest within the prescribed limits, but whether the *event* must happen within those limits. If then, the rule is, that as regards real estate, the "dying without issue" means an indefinite failure of issue, then the limitation over in this will is not good as an executory devise, unless there are some expressions to restrict their import. The circumstance that the limitation over, is to persons in being, is not sufficient. 1 *Harr. and Gill*, 123. Nor as is decided in that case, will the fact, that the limitation over, is but a life estate. It is very clear, that in this case the testator intended to devise his whole estate to his daughters, which object would be defeated by construing the limitation over to be but of a life estate; for then he would die intestate of the fee. Upon the death of either of the first takers, the testator intended, that the survivors should take the same estate, as the deceased; otherwise, if four of them should die without issue, four-fifths of the estate of the testator, would be undisposed of by his will. Upon the death of *Charlotte*, *Elizabeth* took an estate tail in that

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portion of the share of *Charlotte*, which devolved on her. *Lion vs. Burtiss*, 20 *Johns. Rep.* 483. 3 *Morgan vs. Morgan*, 5 *Day*. 517. 3. That part of the estate which was devised to *Charlotte*, and survived to *Elizabeth*, would not have survived to the other sisters in the event of the death of *Elizabeth* before them, but would have descended to those who would have been entitled in the absence of a will. At the date of the deed to *Stump* then, she had an estate tail in this share, not subject to survivorship. But suppose she took only a life estate, under the will, in her part of *Charlotte's* share; still, as one of the four heirs of testator, she was entitled to the reversion in fee, which, added to the previous life estate, gave her a perfect title in fee; and this interest, because one in severalty by the partition, passed by her subsequent deed to *Stump*.

R. N. Martin, in reply, for the appellant, contended, that by the first words of this will, an estate in fee simple is expressly devised to the daughters of the testator, as tenants in common. But it is supposed, that by the subsequent provision, "if either of them die without issue," &c. it is restrained to an estate in tail. That such is the technical import of those words, is not denied. It has, however, this limitation; "if there is nothing in the will showing a different intention on the part of the testator, and restricting the failure of issue to the death of the devisee, or to some other time or event." *Dallam vs. Dallam*, 7 *Harr. and Johns.* 238. If an estate is devised to one for life, and if he die without issue, then over; it is ruled an estate in tail. This is done in favor of the issue. It is not a fee in the devisee, because the intention was, to give to him only an estate for life; and in interpreting a devise of this kind into an estate in tail, the particular intent to devise, in the first instance, an estate for life, is sacrificed to the paramount intention of providing for the issue. So, if an estate in tail is devised with a limitation over, on the devisee dying without issue, it continues an estate tail.

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The subsequent words confirm the character of the estate first devised, and the limitation vests as a remainder. On a devise to A and his heirs, and if he die without issue, to B and his heirs, it is also an estate in tail: for in the absence of all restrictive, or explanatory expressions in the will, the testator is supposed to have used those words in their technical sense; and as there is nothing, in a devise of this kind, indicating an intention on the part of the testator to employ them in a different or more restricted sense, the inference deducible from their legal import, remains unshaken. But it is different when there are in the will restrictive, or explanatory provisions. The words are then rescued from the technical meaning attached to them by the law, and are understood according to their grammatical and ordinary import. It is believed that there is no rule of law more firmly established, than that the court will depart from the technical sense of the words, for the purpose of effectuating the intention of the testator, whenever it appears that he did not intend to make that disposition of his estate, which the technical words import. *Chapman vs. Brown*, 3 *Bur.* 1634, 1635. 1 *Bos. and Pul.* 257. *Cooper vs. Collis*, 4 *Term.* 297, note (*d.*) It was then insisted, that circumstances restricting the general expressions, were to be found in the character of this limitation. What is the nature of this limitation? It is to persons *in esse*, for life—the words “surviving daughters,” define with precision the persons who are to take under the limitation. It is *personal* to them: it does not comprehend their heirs, or issue, so as to admit them to a participation of the estate, if a devisee chanced to die, leaving heirs, &c. before the contingency happened. *Cro. Eliz.* 358. 2 *Merri.* 133. *Woollen vs. Andrewes*, 2 *Bing.* 126. *Jackson vs. Thompson*, 6 *Cowen*, 178. *Newton vs. Griffith*, 1 *Harr. and Gill*, 119. Nor was the estate to which a surviving daughter might be entitled on the death of a sister, without issue, assignable, alienable, or devisable, until the party who was to receive it, had become *persona designata* by the occur-

rence of the contingency on which it was to survive. *Doe vs. Tomkinson*, 2 *Maul. and Sel.* 165. *Prest. on Est.* 76. That no more than a life estate was limited to the surviving daughter, is shown by the cases of *Woodward vs. Glasbrook*, 2 *Vesey*, 388, and *Pettywood vs. Cook*, *Cro. Eliz.* 52. But whether there was a devise over, for life or in fee, is not deemed material to this part of the argument; for it has been seen, that by this limitation, provision is made only for the *individual* daughters surviving, and not the surviving branch: consequently, it never could be enjoyed, unless the contingency happened during their lives: they must have lived with the first devisees, have outlived them, and been in existence on the occurrence of the contingency. It has all the restrictive influence that can be attributed to the limitation of a life estate. It is much stronger than the limitation of a mere *constructive* life estate, as it is *expressly* confined to the surviving daughters; and would seem to demonstrate, that the testator contemplated a proximate, and not a remote event, as that on which the investiture of the limitation over, was to depend. *Pells vs. Brown*, *Cro. Jas.* 590. *Porter vs. Bradley*, 3 *T. R.* 145. *Roe vs. Jeffreys*, 7 *T. R.* 569. *Doe vs. Webber*, 1 *B. and A.* 713. *Clayton vs. Lowe*, 5 *B. and A.* 636. *Hughes vs. Sayer*, 1 *P. Wm.* 534. *Massey vs. Hudson*, 2 *Mer.* 133. *Fosdick vs. Cornell*, 1 *Johns.* 440. *Ex. of Moffatt vs. Strong*, 10 *Johns.* 12. *Jackson vs. Thompson*, 6 *Cowen*, 178. *Keyting vs. Reynolds*, 1 *Bay*, 80. *Morgan vs. Morgan*, 5 *Day*, 517.

It was contended that the cases of *Newton vs. Griffith*, 1 *Harr. and Gill*, 111. *Roe vs. Scott and Smart*, 2 *F.* 259. *Chaddock vs. Cowley*, *Crok. Jac.* 695. *Hope vs. Taylor*, 1 *Bur.* 288. *Romilly vs. James*, 6 *Taunt.* 263. *Tenny vs. Agar*, 12 *East.* 259. *Denn vs. Shenton*, *Cowp.* 410, cited for the appellee, were distinguishable from that before the court. In *Denn vs. Shenton*, *Cowp.* 410, there was a devise to one of the heirs of his body, and their heirs, forever, and if he died without issue to W. G. in fee, chargeable with the

payment of £100, to A. the testator's niece, within one year after *W. G.* or his heirs, should be possessed of the premises. There was in this case no circumstance restrictive of the general words. The limitation being to *W. G. and his heirs*, it is clear that if *W. G.* had died before the contingency happened, the estate would have vested in his heirs. Nor was the bequest of the £100, *personal* to the niece, as in *Doe vs. Webber*, 1 *B. and A.* 713; for if she had died before the occurrence of that event, on which the legacy was to be paid to her, her representatives would have been entitled to it. *Pinbury vs. Elkin*, 1 *P. Wm.* 563. The case of *Newton vs. Griffith*, certainly bears a general resemblance to the one under consideration; but in controversies depending on the construction of wills, authorities have no great weight, unless they agree exactly in every point, and are similar in every respect, with the case to be decided. You may refer to them for light, in reference to the general rules by which such instruments are to be interpreted, but without this strict similitude, they have no binding force; they must be almost *in verbis ipsissimis*. *Dodson vs. Green*, 2 *Wil.* 324. 3 *Wil.* 247. The reason of this principle is obvious; for the intention of a testator is often indicated by the most minute circumstances and expressions. Now, in *Newton vs. Griffith*, the limitation was to the survivors, and *their heirs*. Here it is personal to the surviving daughters; the materiality of which distinction, is forcibly stated by the learned court, at page 119 of the report, and is distinctly announced in *Massey vs. Hudson*, 2 *Merriv.* 133. In the case cited, there was only a devise of lands: by this will the testator has disposed of the whole of his estate, both real and personal. If in this controversy the testator's personal estate was involved, it is supposed that the court could not refuse to give effect to the limitation, as a valid executory devise. Why? Because it would be said, the testator must have contemplated a definite failure of issue: but it is evident he meant to fix the same time as to both estates; they were devised *in uno*

flatu. In *Chandess vs. Price*, 5 *Vesey*, 101, the Lord Chancellor said, “that the meaning of the words as to fixing the period, must be the same, in the same will.” Again, in this will the testator has devised the *whole* of his estate; this word is not to be found in *Newton vs. Griffith*: and although it is not contended that this word, if standing alone, could restrain the legal import of the general expressions, yet it comes in aid of the restrictive influence, attempted to be deduced from the other provisions of the will: for, the inquiry is, did the testator intend to make that disposition of his estate, which the general words, in their technical sense, import? Did he introduce them for the purpose of marking out a particular path of descent? or were they not rather used, to qualify the estate devised by the first words, and to declare when, and under what circumstances, it should cease. It is true, that this court, in considering the second branch of the devise, in the above case, say, that the circumstance of the devise over being general, without words of limitation, is not sufficient to “narrow down” the general expressions. But the restrictive circumstances furnished by the character of this limitation, are more forcible than any that can be drawn from a *constructive* life-estate. For, by this will, as we have seen, the estate is limited *expressly*, and not by *construction*, to the surviving daughters. It is, therefore, submitted, that inasmuch as this opinion was pronounced in reference to a will, differing from the one at bar in many of its most material features, it is impossible to regard it as binding authority. As to the case of *Chaddock vs. Cowley*, it is enough to say that it is obscurely reported: that it is at war with *Pells vs. Brown*, the parent case on this branch of the law; and that it is discredited by the extraordinary remarks attributed to the judges, who are supposed to have given the opinion. It will be found, that the cases relied on as conflicting with the construction for which we contend, are,

1. Cases where there were no circumstances or expressions restrictive of the legal import of the words, dying without

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issue. *Romilly vs. James*, 6 Taunt. 263. *Terry vs. Agar*, 12 East. 254, &c. 2. Cases where, by the first words of the will, an estate for life was devised, yet was enlarged to an estate in tail, in favor of the issue. In those cases, the question necessarily was, whether the devisees received estates for life, or in tail. 3. Cases where the devisee having left issue living at his death, the devise over was construed a remainder, for the sake of the limitation, as it could not be maintained by way of executory devise. *Roe vs. Scott and Stuart*, 2 F. 269, &c. 4. Cases where, if the limitation was to the survivor, it was to them and their heirs; and decided on the principle, that the heirs could come in under the limitation, on the death of the devisees before the contingency happened. It is obvious, that in this class of cases, the word *heirs* disarms the limitation of all the restrictive influence which might be derived from it, if it was confined, as in this case, expressly and personally, to the surviving daughters. As to that portion of the estate devised to *Charlotte*, and which survived on her death, it was contended, that it vested in the surviving sisters, only for life. In support of this position, the authorities already cited, were referred to. That it did not merge in the inheritance, as supposed by the counsel for the appellee, because it was not to survive again, on the death of the devisee to whom it was limited. On the death of *Elizabeth*, her share reverted to the appellants, as the heirs at law of the testator; or if it is considered as having become absolute in *Elizabeth*, by the circumstance of her being the last survivor of the daughters, still, as that circumstance at the epoch of the deed under which the defendant claimed, was not ascertained, but contingent, *Elizabeth* had a disposable interest, only to extent of her life estate. The doctrine of *estoppel* cannot apply. *Elizabeth* had, at the time of the deed, a life estate in the premises, and the court will intend that one deed was designed to operate on that life interest. 3 Com. Dig. 84. On this hypothesis, *Elizabeth* having died, the appellants became entitled to the estate, as her

heirs at law. In either view, the judgment must be reversed.

BUCHANAN, Ch. J., delivered the opinion of the court.

It is a general rule in the construction of wills, that a limitation, which may operate as a remainder, shall not be construed an executory devise; and we can perceive nothing in the devise of *Nathaniel Giles* to his five daughters of the premises, for an undivided part of which this suit was brought, to take it out of the operation of that rule.

If the devisees took estates in fee simple, as has been contended, as in strictness, a remainder cannot be limited after a fee simple, the limitation over might be construed to take effect by way of executory devise, by which means, being a disposition by will, which is more favored in construction than a deed, a fee simple or other less estate, may be limited after a fee simple. But in *Newton, et al. vs. Griffith, et al.* 1 *Harr. and Gill*, 111, the whole doctrine applicable to this case was ably discussed at bar, and fully considered and examined by the court. There the devise was, by a father, of certain land to his son *George* and his heirs, and of certain other land to his son *Joseph* and his heirs; and in case either of them "should die, having no lawful issue or heirs of his body," then the surviving son "to have his deceased brother's part of the land," to him and his heirs; and in case both sons "should die, leaving no lawful heirs," then all the lands to go to the testator's three daughters, *Sophia*, *Sarah*, and *Nancy*, to be equally divided between them; and it was held, that the two sons, *George* and *Joseph*, as the law stood before the act of 1786, *ch. 45*, (the act to direct descents,) took estates tail general in the lands respectively devised to them, with cross remainders in tail general, remainder to *Sarah*, *Sophia*, and *Nancy*, for life. Here the devise is, by a father, in these words: "I give and be ueath the whole of my estate, both real and personal, unto my five daughters, by the names of *Hannah*, *Sarah*, *Elizabeth*, *Caroline*, and *Charlotte*, to them and their heirs forever, to be equally

divided amongst them ; and it is my will, that if either of the said children die without issue, lawfully begotten of their body, in that case, the part of the said child, be equally divided among my surviving daughters.” And without travelling through the multitude of authorities relating to the subject, but relying upon the decision in the case of *Newton, et. al. vs. Griffith, et. al.*, from which, in principle, we think this case cannot be distinguished, it is our opinion that the devisees did not take defeasible estates in fee simple, and that the limitation over cannot be construed to operate by way of executory devise ; but being before the act to direct descents, that they took estates tail general, with cross remainders, under the limitation over to the survivors. It has been ingeniously attempted to distinguish this case from *Newton and Griffith*, by construing the limitation over to the survivors, to be for life ; and then contending that the limitation for life to the survivors, who were necessarily persons in *esse*, shows that the testator intended a definite failure of issue, that is, a failure of issue at the time of the death of the devisee ; on whose decease, without issue, the land devised to her, was to go to the survivors, upon the ground that he must have intended the limitation to take effect during the life in being, and consequently, could not have meant an indefinite failure of issue. But the rule is, not that the limitation over must take effect, within a life in being, but that the contingency on which it is made to depend, must happen, if at all, within the compass of a life or lives in being, and twenty-one years, and a fraction afterwards. Upon that distinction, which, when examined, will be found to be a very clear one, and the argument drawn from the circumstances of the limitation being for life to the survivors, though very specious, yet not to be sustained, one branch of *Newton and Griffith* was decided. The limitation over to the three daughters, on the contingency of the sons dying without issue or heirs of their bodies, was of an estate for life, to persons in being, just as strong as a limitation over to a survivor for life, which is

but a limitation for life to one in being, and the limitation over to the daughters, was held to operate, not by way of executory devise, but by way of remainder, after estates tail vested in the sons, and not to restrict the words, "leaving no lawful heirs of their bodies," to mean a failure of issue, at the death of the surviving brother; and cannot well be distinguished from the principle of the cases of *Denn vs. Shenton*, Cow. 410, and *Barlow vs. Salter*, 17th Ves. 479, there cited. Construing the limitation over to the survivors in this case, to be in fee simple by force of the words, "the whole of my estate," in the beginning of the devise, and carrying the word estate on to the limitation over, or in fee tail by implication of law, and the question whether the devisees took estates tail, with cross remainders, is clear of difficulty. But treating it (as has been done by the counsel for the appellant in argument) as a limitation for life only, then *Elizabeth*, under the authority of *Newton and Griffith*, took the portion of the real estate devised to her in fee tail general, and if the devisees had not been the heirs at law of the testator, would, on the death of *Charlotte*, without any descendant then living, have become entitled to one-fourth of the portion devised to her, by way of remainder for life, with reversion in fee to the heirs at law of the testator. But the devisees, being also the heirs at law of the testator, the life estate in the fourth of *Charlotte's* portion, which survived to *Elizabeth*, merged in the inheritance, and she became entitled to that fourth in fee simple absolute. There being, in this case, no survivor over, of a survived share, under the general rule, that where there are no particular and sufficient words used for that purpose, surviving shares, will not survive again, and particularly in relation to devises of real property. *Woodward vs. Glassbrook*, 2 Vernon, 388. *Worldidge vs. Churchill and others*, 3 Brown's Ch. Rep. 465. Having thus a fee simple or a fee tail, in one-fourth of a portion devised to *Charlotte*, according as the limitation over in the devise is construed, and an estate in tail, in her own original portion, which under the partition made between her

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three sisters and herself, after the death of *Charlotte*, were assigned to her as her portion of the estate derived from her father, her deed made afterwards on the 16th of May, 1797, to *John Stump*, passed to him a good and sufficient title in fee simple, to the land therein mentioned, and so assigned to her upon the partition, and the plaintiffs are not entitled to recover.

JUDGMENT AFFIRMED.

McNULTY vs. COOPER.—*December, 1831.*

The blank endorsement and delivery of a bond invests the holder with the right of collecting, or suing for, in the name of the assignor, the money due upon such bond; and of appropriating the same to his own use. It is *prima facie* evidence of title to such bond in the assignee, and he may write a formal assignment over the assignor's signature.

The courts will not lend themselves to a donee or assignee, to enforce and inchoate contract, not founded upon a valuable consideration; neither will they lend their aid to a donor or assignor, in a case where the gift or assignment has been consummated by possession, to recover back what the donee or assignee has received or collected.

APPEAL from *Frederick County Court.*

This was an action of *Assumpsit*, instituted by the appellee, *John Cooper*, against *Cornelius McNulty*, the appellant, on the 30th January, 1826, to recover the amount of two bonds, dated on the 21st August, 1819, conditioned each for the payment of \$533 33, which the declaration alleged, the plaintiff, at the request of the defendant, had delivered to, and deposited with the defendant, in the years 1822 and 1823, which bonds, or the value thereof, the defendant promised upon request, to return to the plaintiff, but which he had refused to do.—In addition to the count upon the special agreement, there were the common money counts. The defendant pleaded *non assumpsit*, and issue was joined.

1. At the trial the plaintiff read to the jury, the record of a judgment rendered against him, in *Frederick County Court*, in November, 1819, in favor of *David Morrison*, for \$600, with interest from June, 1818, and costs, which judgment was superseded by the defendant, and one *William Kolb*. He then proved the execution to him of the bonds described in the declaration, by the obligor therein named, with the following endorsements thereon written, to wit: "For value received, I assign over to *Cornelius McNulty*, all my right, title, and interest to the within bond, as witness my hand, &c."—and proved, that the defendant had received various payments, made by the obligor, from time to time, on account of the bonds. It was admitted by the counsel for the defendant, that the words, "for value received, I assign to *Cornelius McNulty*, all my right, title, and interest, to the within bond, as witness my hand, &c.," were written and filled up, a day or two before the trial, over the name of the plaintiff, without his knowledge or consent, but the name of the plaintiff written on the back of the bonds, was proved to be in the hand writing of the plaintiff. The defendant then proved by the sheriff of the county, that he had paid, as one of the superseders, on the before mentioned judgment, several sums of money, (though not equal in amount to the bonds,) and thereupon prayed the court to instruct the jury, that under the evidence in the cause, the delivery of the bonds, by the plaintiff to the defendant, with the name of the plaintiff endorsed on the same, and the acts of ownership exercised by the defendant, over said bonds, in the several receipts of money, paid on the same to the defendant, by the obligor in said bonds, and the defendant's possession of the same, was *prima facie* evidence of title, in the defendant, to said bonds. But the court (SHRIVER, A. J.) refused the instruction so prayed, and directed the jury, that if they should believe from the whole of the evidence in the cause, taken together, there was an actual sale, or transfer of the bonds by the plaintiff to the defend-

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ant, then they must find a verdict for the defendant. On the other hand, if they should believe from all the evidence in the cause taken together, that there was not an absolute sale, nor transfer of the bonds; or if they should believe the plaintiff had delivered the bonds to the defendant, for the special purpose of enabling the defendant to secure himself against any liability, as superseder for the plaintiff, and when that liability should terminate, to satisfy, or account with the plaintiff, for any monies he might receive on the bonds, over and above the total sum of the payments he might make for the plaintiff, as his superseder, then, if from the evidence they should believe, that such liability of the defendant had terminated, the plaintiff was entitled to recover the balance of the total sum of money received by the defendant, on the bonds, after deducting the payments, made by the defendant for the plaintiff, as his superseder. The defendant excepted, and the verdict, and judgment being against him, he brought the present appeal.

The cause was argued before BUCHANAN, Ch. J., STEPHEN, and DORSEY, J.

Ross, and F. A. Schley, for the appellants, contended,

1. That the signature of *John Cooper*, the obligee, on the back of the bonds, and the delivery of them by him, to the defendant, was *prima facie* evidence, that *Cooper* had relinquished his right to the money due thereon, and had transferred the same to the defendant. 2. That the question of sale, and transfer, was a question of law, founded on facts not disputed, and should not have been submitted to the jury. 3. There was no evidence, from which the jury could infer, that plaintiff had delivered the bonds to the defendant, for the special purpose of enabling the latter, to secure himself, from liabilities incurred as a superseder for the plaintiff, and therefore no such question should have been raised before the jury. They referred in the

argument to *Master vs. Miller*, 4 *Term. Rep.* 340. 1 *Pow. on Mort.* 23. (a) 3 *Ib.* 1060. (a) note (1.) *Jones vs. Witter*, 13 *Mass. Rep.* 304. 1 *Bay.* 66, 406. 2 *Greenleaf Rep.* 334. *Green vs. Hart*, 1 *Johns. Rep.* 589. *Jerome vs. Whitney*, 7 *Ib.* 321. *McElderry vs. Flannagan*, 1 *Harr. and Gill*, 32. *Clark vs. Ray*, 1 *Harr. and Johns.* 323.

Palmer, for the appellee. 1. The mere possession of a bond, with the name of the obligee endorsed thereon, in blank, is not *prima facie* evidence, of an assignment for value. Such an endorsement does not *per se* import a consideration. 2 *Greenleaf*, 143, 322. The assignee of a bond, or single bill will not be protected either at law, or in equity, unless he can show that he holds for a valuable consideration. In this case there is nothing to show, that the money paid by the defendant, as one of the plaintiff's superseders, was the consideration upon which the assignment was made, but if there was, it should have been submitted to the jury. 2. The court was called upon, by the prayer of the defendant, to instruct the jury upon a *part* of the evidence, without regarding other parts, which, even if the defendant had made out a *prima facie* case, completely destroyed it. If the court are at liberty to grant a prayer of this description, predicated upon a part only of the evidence, then they may indirectly exclude evidence, which had previously gone to the jury. He referred to *Chirac vs. Reiniker*, 2 *Peters S. C. Rep.* 625. *Caton vs. Veale and Lenox*, 5 *Randolph* 31. *Cruger vs. Armstrong and Barnwall*, 3 *Johns. Cases*, 5. *Conroy vs. Warren*, *Ib.* 259. *Dugan vs. U. S.*, 3 *Wheat. Rep.* 182. *Chitty on bills*, 7, 8, 9, 14, 173.

DORSEY, J., delivered the opinion of the court.

We think the County Court erred in refusing to grant the prayer of the appellant, as set out in his bill of exceptions. It is the duty of courts, when not restrained from doing so by some rule of law, to give to the acts, and

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agreements of the plaintiff and defendant, that interpretation which the common sense of mankind would impute to them ; and so to effectuate that interpretation, as to accomplish the design and intention of the parties, as far as it can be done, according to the established principles of law. Thus influenced, we cannot do otherwise than say, (in the absence of all proof to the contrary,) that the blank endorsement, and delivery of a bond by the obligee, invests the holder with the right of collecting, or suing for, in the name of the assignor, the money due on such bond, and of appropriating the same to his own use ; or, as is stated in the prayer, that it is *prima facie* evidence of title to said bond in the assignee. So far from there being in this case any facts repelling this natural presumption, we regard them as strong in its corroboration, by shewing a probable valuable consideration for the transfer, and that the appellee, for three or four years, took no steps to repossess himself of the bonds, which in his declaration he alleges, were merely delivered to the appellant, to be returned on request ; and that during that period, *McNulty*, in a succession of payments, collected as his own, nearly the whole amount due on the bonds.

It has been alleged, that the prayer of the defendant below, was predicated upon an isolated part of the testimony, and that therefore, the court were justified in its rejection. If this position, as regards the law, were a sound one, the allegation, as to the fact, is not sustained by the record. The instruction was asked, not simply upon the facts enumerated, but upon those facts, when considered in connexion with all the other evidence in the cause. The argument was strongly urged too, that no title accrues to the assignee ; that the claim of the plaintiff could not be resisted, but by its appearing that the transfer was made for a valuable consideration, of which no evidence had been offered. In considering this proposition, let it be conceded that no consideration passed ; that the obligee made a gift of these bonds to the appellant. Does it thence

follow, that he can maintain *replevin*, *detinue*, *trover*, or *assumpsit*, to recover the bonds themselves, or their value in damages; or can a general *indebitatus assumpsit*, be supported against the assignee, for the money he may have received under the assignment? There is no principle, or analogy in the law, to authorise such a recovery. 'Tis true, that neither courts of law, nor of equity, will lend themselves to a donee, or assignee, to enforce an inchoate contract, not founded on a valuable consideration. But it is equally certain, that they will not lend their aid to a donor, or assignor in a case, where the contract has been consummated. He cannot reclaim by process of law, what he has given or assigned, where the gift or assignment has been perfected by possession. Having endorsed, and delivered the bonds, (of which delivery, the possession of the appellant is *prima facie*, sufficient evidence,) no action, either at law or in equity, can be maintained by the assignor for their recovery; nor for the money which has been collected under the assignment. From the view which we have taken of the testimony in this cause, we cannot approve of the instruction given to the jury. They were instructed, that they might draw conclusions, and infer facts, which the evidence before them was not legally sufficient, to warrant them in finding. Believing there is error in the County Court's refusal to grant the prayer of the appellant, we reverse their judgment.

JUDGMENT REVERSED.

DAVID ARNOLD vs. GEORGE COST.—December, 1831.

In an action of slander, it appeared that the defendant had charged the plaintiff with having forged the following instrument, which it was alleged, had been delivered to defendant's slave, to assist his escape: "Know all men by these presents, that the said negro boy was the property of my uncle R.

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living near, &c. He died without any heirs; he never was married, therefore he made all his negroes free, by will and testament. This boy's name is S. He always behaved honestly and industriously; is a good hand about horses, and a good wagoner. The farmers in our part have, for common, all slaves or hands of their own, therefore he wants to try some other part. The commissary's office at F. will prove his freedom. Witness, &c. I. (Seal.)" HELD, upon demurrer, that this instrument, if genuine, might have prejudiced 'I,' by subjecting him to a claim for damages to the owner of any slave to whom it might have been given, or to a criminal prosecution, if such slave absconded; that it was therefore the subject of forgery at common law, and sustained the action.

It is not now held to be essential to the offence of forgery, in any case, that some one must have been injured. It is sufficient, if the instrument forged, supposing it to be genuine, might have been prejudicial. The question whether a particular instrument is capable of supporting a charge of forgery, is referrible not to the form, but to the substance of it.

ERROR to *Frederick County Court*.

This was an action on the case for *slander*, commenced by *George Cost*, (the appellee,) against *David Arnold*, (the appellant,) on the 27th of January, 1827.

The declaration contained six counts, but a *nolle prosequi* was entered on the fourth, fifth and sixth. The *first* count, after the inducement of good character, proceeded as follows: and whereas also before the committing of the several grievances by the defendant, as in the *first*, *second* and *third* counts hereinafter mentioned, the defendant was possessed of, and owned a *certain* negro, named *Jerry*, the slave and the property of the defendant, and in his service and employment, to wit, at, &c. to which negro slave, to enable him to escape from the service of his master, (the defendant,) some person unknown to the plaintiff, delivered a paper written in the following words and figures, to wit: "Know all man by this present that the said negro boy was the property of my *onkle*, *Richard Johnson*, living near the mouth of *Monocosa*. He deceased 1821. He died without any *airs*. He never was married. Therefore he *maid* all his negroes free by his will and testament. This boy name is *Sam Waker*. He always behaved *onest*, and *industrust*, and is a good hand about horses, and a good wagoner. The

farmers in our part *has* for common all slaves or hands of their own, therefor he wants to *dry* some other part, the *commossary offis ad Frederick town* will *proof* his freedom, herewith I *haf sat* my hand and seal, *Thomas Johnson* (Seal) near the mouth of *Monocosa*, *Frederick county, Maryland*, date 25th September, 1826:" and which paper the defendant had often, before the committing of the several grievances by him, as in said *first, second* and *third* counts, hereinafter mentioned, declared, to wit, at, &c., to be a forgery, and not written or signed by the said *Thomas Johnson*, whose name is subscribed to the same: and the said plaintiff further saith, that *David Arnold*, well knowing the premises, but greatly envying, &c. and contriving, and maliciously intending, &c. and to bring him into public scandal, &c. and to cause it to be suspected, &c. that the plaintiff had been, and was guilty of forgery, and to subject him, &c. and also to vex, harrass, &c. heretofore, to wit, on, &c. in a certain discourse which the said *David Arnold*, then and there had in the presence and hearing of one *Henry Koontz*, and of divers good and worthy citizens of this State, he, the defendant, in the presence and hearing of the said *Henry Koontz*, as also of the said last mentioned citizens, falsely and maliciously spoke, and published, of and concerning the said plaintiff, and of and concerning the said paper, and of and concerning the writing and forging the same, the false, scandalous, malicious and defamatory words following, that is to say: "he," (*meaning the plaintiff*), "wrote it," (*meaning the said paper*), "and I," (*meaning the said defendant*), "will swear to it; and I," (*meaning the said defendant*), "can get others who will swear to it," (*meaning that the said George Cost had wrote and forged said paper, and was guilty of the crime of forgery, and that the said David Arnold would swear to it, and could get other persons who would swear to it.*)

The *second* and *third* counts alleged, that the defendant had charged the plaintiff in the *German* language, setting

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out the words and translating them, with the crime of having forged the paper referred to in the first count. There was a general demurrer and joinder.

The County Court overruled the demurrer. The plaintiff then executed a writ of inquiry, at bar, and the court gave judgment for the damages (\$700,) found by the jury. Whereupon the defendant sued out the present writ of error.

The cause came on to be argued before BUCHANAN, Ch. J., MARTIN, STEPHEN, and DORSEY, J.

William Schley, for appellant.

The questions in this case, arise upon the demurrer to the *first*, *second* and *third* counts of the declaration. The demurrer was overruled by the court below. Each count is substantially the same. The *colloquium* and *inuendo* are alike in all the counts. The demurrer admits the *facts* alleged; but not the conclusion of law. If the antecedent matter does not warrant the *inuendo*, then the *truth* of the *inuendo* is not confessed by the demurrer to raise an issue in law upon the propriety of the *inuendo*, but is directly put in issue. The office of the demurrer is in reference to the antecedent matter. To show the nature and office of the *inuendo*, he referred to 1 *Saund. Rep.* 243 (n. 4.) *Holt vs. Schofield*, 6 *Term Rep.* 694. *Stark. on Sland.* 293. *Sheely vs. Biggs*, 2 *Harr. and Johns.* 364. The words in this case not being actionable *per se*, an inducement was indispensable, and a *colloquium*; but the words must be construed *secundum subjectam materiam*, and their meaning cannot be extended beyond their legal sense, as applied to the occasion on which they were used, and the subject matter to which they referred. 4 *Coke's Rep.* 20. 1 *Chitty's Plea.* 194. *Stark on Sland.* 87. If it were otherwise, a demurrer could never be successfully interposed, in an action of slander; because the pleader, in every instance, would give himself a cause of action by the scope of his *inuendo*, although the antecedent matter should disclose no legal

injury. No *special* damage is averred ; and the plaintiff can only recover, if the charge imputes a *crime*, involving moral turpitude, or for the commission of which, he would be obnoxious to some infamous punishment. *Stark on Sland.* 19, (n. 1.) *Stanfield vs. Boyer*, 6 Harr. and Johns. 248. The charge, at least, must be of such a scandalous nature, as would necessarily tend to the degradation of the individual in society. *Button vs. Heyward*, 8 Mod. 24. He recurred to the *count*, and stated the averments to be, that some person (other than Johnson, whose name is thereto signed,) wrote the paper hereinbefore set forth, and gave it to defendant's slave, *with a view* to enable him to escape ; that defendant spoke of said paper as a *forged instrument* ; and maliciously charged the plaintiff with having written said paper. There is no averment, that the defendant's slave did escape ; much less, that he escaped *by means of said paper*. He insisted that the defendants having called the instrument a *forged instrument*, was immaterial ; unless the false making of such an instrument would amount, in law, to forgery: as where the words used were, "you are a thief;" and it appeared that the words were used in reference to an act, which amounted, in law, to a mere *trespass*, it was decided that the words were not actionable. *Dexter vs. Taber*, 12 John Rep. 239. 1 *Starkie's Rep.* 67. He also referred, on this point, to 4 *Coke's Rep.* 12, 13. He contended that the paper was not such an *instrument*, as could be the subject of forgery, either under any act of assembly, or at common law. It is not the false making of every writing that will amount to forgery ; if it be merely frivolous ; of no validity upon its face, nor having the semblance of an effective paper: if it be a writing that could not, if genuine, prejudice another's right, although it be made *malo animo*, the maker, however culpable in morals, is not guilty of the crime of forgery. The counterfeit instrument must be such, that if genuine, it would avail to invest some one with a right, or to divest a right, or to charge some one with a responsibility ; it must be such an instrument "as purports on the face of it, to be

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good and valid, for the purposes for which it was created.”
4 Com. 247. 1 *Leach's Cases*, 117. (*Sterling's Case*.)
2 *East's Pleas*, Cr. 860.

1. It is not a forgery, under any act of assembly. It purports to be a certificate of freedom. By the act of 1805, ch. 66, sec. 3, the counterfeiting a certificate is indictable; but this paper has none of the legal attributes of a certificate of freedom. A *valid* certificate of freedom can only be given by a county clerk, or a register of wills, under the seals of their respective offices; it must contain a *descriptio personæ* of the party; his height, notable marks, &c. This instrument purports to be given by a *private* individual; it is not under *seal*; it contains no description of the person. If genuine, would it be valid as a certificate of freedom? Could the party, who made this paper, be indicted, under this act, for counterfeiting a *certificate of freedom*? He could not; because it would be wholly wanting in the requisite formalities. *Wall's case*, 2 *East*. 953. *S. C.* 2 *Russell*, 349. *Moffat's case*, 2 *East*. 954. 2 *Russ.* 348. It is not contended, that it would not be forgery, *merely* because, if genuine, it would be *invalid*—it is sufficient, if it have the *semblance* of a genuine instrument. If, for instance, *Johnson's* name was signed *as Register*, the paper in so far, would have borne the semblance of a valid certificate, although, in fact, he was not such officer. The objection would have been *collateral*; not apparent on the face of the instrument. Such was the case of the protection in the name of *A. B.* as a member of Parliament, when he was not such in fact. *Deakin's case*, 1 *Sid.* 142. The will of a living person—*Sterling's case*, 2 *Russ.* 340. The order of a discharged seaman—*McIntosh's case*, 2 *Russ.* 345. He also referred to cases of unstamped promissory notes, which cannot be recovered in an action at law, but the false making of which, it is admitted is forgery. *Hawkeswood's case*, and *Morton's case*, 2 *Russ.* 340. But an unstamped paper is not merely void: it may be received in evidence for many collateral purposes. 3 *Starkie's Ev.* 1383. This

paper is within none of these qualifications to the position, first assumed. Again—by the act of 1796, *ch. 67, sec. 19*, any person who shall give *a pass* to another's slave, is indictable. *A pass* is a license by a master to *a slave*. This paper does not purport to be signed by *a master*; nor does it state the bearer to be *a slave*. The person who falsely made this paper, could no more be indicted under the act of 1796, for giving *a pass* to defendant's slave, than he could under the act of 1805, for counterfeiting *a certificate of freedom*.

2. At common law the paper has no validity *per se*. If genuine, it could not, *proprio vigore*, destroy Arnold's claim to his slave. If the slave had been apprehended as a runaway, this paper would not have entitled him to his discharge on *habeas corpus*. It may be said, it might have *facilitated* his escape. This is not a *test* of forgery; it would be a consequential, and not a direct effect of the paper: the same result might be predicated of any other writing. If the negro did escape, *and by means of this paper*, then Arnold would have had his special action on the case against the party giving it, not merely for the *making* such a paper, or for *giving* it to his slave, *but for enticing him to run away*. 1796, *ch. 67, sec. 19*. *Duvall vs. State*, 6 *Harr. and Johns*. 9. If defendant had charged plaintiff *with enticing his slave to run away*, he would have uttered a slander, because he would have imputed to him an indictable act. But the plaintiff's action, in such case, would have been, because of *his* substantive charge, although the defendant may have referred to the paper as the *means* used by the plaintiff; and not for a supposed imputation of forgery. He referred to the case of the *People vs. Shall*, 9 *Cowen*, 778, as strongly in point.

Palmer, for the appellee. 1. Every thing which is well pleaded, is admitted by the demurrer. The matters contained in the *colloquium* and *inuendo*, are to be considered together. 1 *Chitty's Plead.* 381. *Hawkes vs. Hawkey*, 8

East. 431. *Roberts vs. Camden*, 9 *ib.* 93. *Rex vs. Horn*, *Cowp.* 678, 684. 2 *Saund. Pl. and Ev.* 365. The demurrer admits the forgery of the paper, and that it was intended to work a fraud, these things being charged in the declaration. 2. But the paper *per se*, is the subject of forgery at the common law, as an injury *might* have resulted from it, which is the true criterion for determining the question of forgery. *Chitty Crim. Law*, 1022. The object and design of the paper, was to facilitate the escape of the slave to whom it was given, and if capable of producing that effect, it is clearly the subject of forgery. *Rex vs. Ward*, 2 *L. Ray.* 1461. *Chitty Crim. Law*, 1023. *East's Cro. Law*, 862. 2 *Greenleaf Rep.* 365. That the paper was calculated to aid the slave in his escape, he insisted there could be no doubt; and if so, then according to the above authorities, it was manifestly an instrument of which forgery might be committed.

F. A. Schley, on the same side, having referred to the declaration, contended that the demurrer admits all that the jury could have found. The jury are to find the speaking of the words, and the intent and meaning of them, and whether the defendant meant by them, to charge the plaintiff with forgery. *The King vs. Watson*, 2 *Term. Rep.* 206. *Starkie on Slander*, 54, 55. *Goodrich vs. Woolcott*, 3 *Cowen Rep.* 239. By the inducement, the *colloquium* and the inuendoes, the extrinsic facts, incorporated as it were, in the defendant's publication, become *an integral* part of the plaintiffs case, and *the whole forms one entire slanderous charge, upon the face of the record*. *Starkie on Slander*, 290. It is not necessary, in order to render words actionable, that there should be *certainty* in stating the *crime* imputed, as in an *indictment* for the crime. *Miller vs. Miller*, 8 *Johns.* 59. *Niven vs. Munn*, 13 *Johns.* 48. *Gibbs vs. Dewey*, 5 *Cowen*, 505.

With these principles in view, let us ascertain whether the crime of *forgery* is sufficiently charged in the declara-

tion. It is urged by the appellant's counsel, that it is not; because the paper, if genuine, is not such an *instrument* as is known to the law, and of which forgery could be committed. That it does not appear on the face of it, or in its form, to be good and available for any purpose: that it is not a certificate of freedom, nor a pass: that it is a mere idle piece of writing, which, if genuine, would have no legal validity, and could not *proprio vigore*, work an injury. To test the correctness of these objections, it is only necessary to ascertain the correct definition of forgery. *Chitty*, in his treatise on criminal law, says that forgery is the false making of such *writings*, as either at common law, or by statute, are its objects, *with intent* to defraud another. 2 *Chitty's Crim. Law*, 1022. In *Coogan's* case, 2 *East's Crim. Law*, 949, *Buller*, justice, defines forgery to be "*the making a false instrument, with intent to deceive.*" *Blackstone*, 4 *Com.* 247, says that forgery is the fraudulent making or alteration of a writing, to the prejudice of another's rights. 1 *Hawk.* 537. *East* in his crown law, 2d, 852, defines forgery to be the false making of any written instrument, for the purpose of fraud and deceit; and it may be committed in respect of *any writing whatever*. 2 *Chitty Crim. Law*, 1022. And *Russell*, the latest writer on crimes, after a careful examination of all the authorities, and particularly of the two leading cases of the *The King vs. Ward*, 2 *L. Ray*, 1461, and *Fawcett's* case, 2 *East's Cro. Law*, says it is set down as the settled rule now, "*that the counterfeiting of any writing, with a fraudulent intent, whereby another may be prejudiced, is forgery at common law.*" 2 *Russell on Crimes*, 349, 350. In all cases of forgery, it is immaterial whether any person be *actually injured* or *not*, provided any one *may be* injured by it. It is sufficient if the party *might* be injured or prejudiced by it. 2 *L. Ray.* 1466. 2 *East's Crim. Law*, 854, 860, 861, 862. *A possibility of prejudice is enough.* 2 *Strange*, 749. It is sufficient if the writing is *calculated to impose* on mankind *in general*, although an individual *skilled* in that kind of

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writings would detect its *fallacy*. 2 *Chitty's Cro. Law* 1039. The only inquiry then, is, whether the paper set forth in the declaration, had, under the circumstances detailed, a capacity to work an injury, or a prejudice to any person. For, if it had, it is the subject of forgery at common law, though no injury did actually occur. The services of a slave are presumed to be valuable to his master: he has an absolute property in him; to induce such slave, or enable him to escape from his master, is to *prejudice* the rights of the master. By the *act of 1796, ch. 67, sec. 19*, any person who shall be convicted of giving a pass to any slave, or shall assist by advice, *or by any other unlawful means*, in depriving a master of the services of his slave, such person shall be liable to an action for damages at the suit of the master; and on conviction, on indictment, shall pay a fine. The *paper* in this case was well calculated to induce and enable the slave to escape from his master. It was addressed to the public at large—"Know all men, &c." It represented the bearer to be a free man, &c. This paper not only had the capacity, but was well calculated to effectuate the injury to the master, it was designed to effect. If the negro had actually escaped from his master, with this paper in his possession, would it not have been *a means* of facilitating that escape? would not many persons in the country, on being shown that paper by him, have suffered him to pass on; might it not have imposed on many? It stated facts, well calculated to deceive the great majority of persons to whom it would probably have been shown; it might thus have worked an injury to the right of the defendant, by enabling his slave to escape. This paper, with this capacity to prejudice the rights of the defendant, he charged the plaintiff with having written, and placed into the hands of his slave, to enable him to escape out of his service. That is, he charged the plaintiff with having made *a false writing*, which *might* have prejudiced his rights: and this is forgery. *Johnson*, whose name is to the paper, might have been prejudiced by it. Suppose

he had written it and placed it into the hands of the defendant's negro, to enable him to escape from his master, and he had escaped, could not the defendant, on hearing these facts, have recovered damages from *Johnson*, for the loss of his negro's services ; or have indicted him under the act of 1796. Beyond all question he could, for such a case would be strictly and fully within the statute, according to the case of the *State vs. Duvall*, 6 *Harr. and Johns.* 9. But suppose that *Johnson* did not write the paper, and that as asserted by the defendant, *Cost*, the plaintiff, did, and put *Johnson's* name to it, and placed it in the hands of the defendant's negro, to enable him to escape, and he had escaped from the defendant's service ; and when apprehended, this paper had been found in his possession, and the defendant could have proved these facts on the plaintiff, can there be a doubt that he could have recovered damages against *Cost*, or that *Cost* might have been indicted under the act of 1796? If so, then the paper must be a forgery, because it is a paper falsely made, and might have operated, or been used, to the prejudice of the master, to the prejudice of *Johnson*, or to the prejudice of *Cost*. It comes fully within the definitions of forgery. That the injury did not occur, is immaterial in forgery ; it is sufficient if an injury or prejudice *might* have been produced. In this case, however, the defendant has, by his demurrer, admitted that the negro did escape, for in the *colloquium* it is stated, that the defendant "in speaking of *the escape* of the negro out of his service," spoke the words charged. Now, he could not have spoken of his escape, if he had not escaped ; and thus he has admitted that an escape did take place. The cases cited by the appellant's counsel, to show that forgery could not be committed of such a paper as the one set forth in the declaration, are cases arising under particular and highly penal statutes, where the parties were indicted for forging certain instruments, known to the law, and particularly specified in the statutes under which the indictments were framed. In bringing cases within the statute, great particularity is

necessary: the *instrument* forged must not only be called by the *term* used by the legislature, but also set forth that the court may judge whether it properly comes *within the denomination ascribed to it*. 2 *Chitty's Crim. Law*, 802, 1042. 2 *East's Cro. Law*, 983, 985. *Wall's case* was for forging a will of land. This case was under the statute: the words of the statute are, "shall forge a will of land ;" it must, therefore, appear to have been *the very instrument charged in the indictment*, and meant by the statute: and there being but *two* witnesses, it was no will, and was not embraced by the statute. 2 *East's Cro. Law*, 953, 954, 983. *Moffat's case* was for forging a bill of exchange: it was an indictment under the statute; the instrument proved was *not a bill of exchange*, and therefore the case was not brought within the statute. The same remark may be made of all the other cases cited by the appellant's counsel. The cases of *Crook*, *McIntosh*, *Hawkswood*, *Morton*, *Teague*, were cases of prosecutions under particular statutes. *Burke's case* was the only case at common law; and that turned on the point that the instrument was charged in the indictment, *as a promissory note*, and it turned out *in proof*, not to be a promissory note: the *allegata and probata* did not correspond, and on that ground the judges decided the case. The case relied upon by the appellant's counsel, in 9 *Cowen*, was a mere *nisi prius decision* of a circuit judge, and is of no more authority, nor even entitled to as much weight, as the court whose decision this court is now called on to revise. Besides, *Cowen* himself admits, that if the paper in that case could have furnished *the foundation of a liability*, it would have been forgery. The case in 2 *Greenleaf*, 365, sustains throughout, the doctrine in *Ward's* and *Fawcett's case*; "that the forging of *any writing* by which a person *might* be prejudiced, is forgery."

Ross, in reply. The *inuendo* is merely explanatory of the facts contained in the indictment, and cannot be viewed as introducing new facts. Forgery can only be committed

of a paper which may be prejudicial to the party whose name it bears. *Russell on Crimes*, 353. An instrument capable of forgery, must be one which creates or discharges a right, or gives rise to a liability, such as a receipt, bond, or note: but in this case, *Johnson*, whose name is signed to the paper, cannot be subjected by it to any responsibility, nor could his rights, if it were genuine, be in any respect affected by it. A paper of which forgery may be perpetrated, must *per se*, if genuine, be capable of working an injury; it is not sufficient that it may become injurious by extrinsic circumstances. *People vs. Shall*, 9 Cowen, 778.

BUCHANAN, Ch. J., delivered the opinion of the court.

It is unnecessary, and would be a waste of time, to enter upon an inquiry into the grounds of the doubts, that at one time seem to have been entertained, in relation to what instruments were, and what were not, susceptible of the crime of forgery at common law. The difficulties that surrounded the question of forgery or not, have been removed by decisions of acknowledged authority; and it is not now held to be essential to the offence of forgery in any one case, that some one must have been injured. The inquiry is not whether any one has been actually injured, but whether any one might have been prejudiced. In *Ward's case*, 2d *Ld. Ray*. 1461, which was an information for forging an order to charge certain goods to account, and to appropriate part of the proceeds to the defendant's own use, with intent to defraud, &c.; the subject was fully considered. It did not appear, that the person in whose name the order was drawn, had received any prejudice; but it was held to be immaterial to the offence of forgery, whether any person had been actually prejudiced or not, provided any person might have been injured by it; and that the counterfeiting of any writing, with a fraudulent intent, whereby another may be prejudiced, is forgery at common law—2d *East's Cro. Law*, 854, 860, 161, 862. *Russell on Crimes*, 351, 352. In 2d *Chitty's Crim. Law*, 780, 1022, forgery is defined to be, "The false making, or alteration of such

writings, as either at common law, or by statute, are its objects, with intent to defraud another ;” in *Coogan’s* case, *2d East’s Cro. Law*, 853, by Justice *Buller*, “the making of a false instrument with intent to deceive,” and in *2d East’s Cro. Law*, 852, “the false making of any written instrument, for the purpose of fraud, and deceit,” as resulting from all the authorities, ancient and modern, taken together. *Chitty*, in his treatise on *Criminal Law*, 2d vol. 781, 1022, considers it as settled by *Ward’s* case, that “forgery at common law might be committed in respect of any writing whatever, by which another might be defrauded ;” and in 781, 1023, speaking of *Ward’s* case, and the case of *Fawcett*, to be found in *2d East’s Pls. Cro.* 862, he says : “Every kind of writing seems, on the doctrine of those cases, to be a thing, in respect of which, forgery at common law may be committed.” Hence, it would seem to be settled, that the question, whether a particular instrument is capable of supporting a charge for forgery, is referable not to the form, but to the substance of it, and to be determined alone by that criterion ; the chief ingredients of that offence being fraud, and an intention to deceive ; to which the principle on which the case of the *People vs. Shall*, 9 *Cowen*, 778, cited in behalf of the appellant was decided, is not opposed. The court there, having gone on the ground that the instrument on the face of the indictment appeared to be one, which, if genuine, would, have been void ; and therefore, an instrument, by which no one could have been prejudiced. Applying then as a test, the principle established in the cases of *Ward* and *Fawcett*, and recognized and adopted by the elementary writers to this, and assuming the position laid down in *3d Term. Rep.* 176, and *2d Chitty’s Crim. Law*, 796, 1036, “that it is not necessary to constitute forgery, that there should be an intent to defraud any particular person, but that a general intent to defraud will suffice :” is the instrument in question, a forgery at common law ? which is answered by the solution of another question ; could any person have been prejudiced by it ? of which there can, we think, be no doubt.

The appellant, who was the owner of the negro man to whom that paper was given, might have been prejudiced by the absconding of his servant, whose escape it might have facilitated. It was calculated to deceive and impose upon most who might see it, and there were few, if any, by whom he was unknown, who would not, on the production of it, have suffered him to proceed. Who can doubt that such a paper, put in the hands of a negro, and purporting to be signed by one or more respectable men known in the community, would be his sufficient passport, by means of which, he would be able to effect his escape from the service of his owner? And *Johnson* also, whose name is subscribed to that paper, might have been prejudiced; for, if it had been genuine, that is, if he had written it, and given it to the appellant's negro, who had thereby effected his escape, it is perfectly clear, that he would not only have been liable to an action for damages by the owner, but also to a criminal prosecution under the act of 1796, *ch. 67, sec. 19*, according to the case of *Duvall vs. the State*, 6 *Harr. and Johns.* 9; which act provides against the depriving an owner of the services of his slave by any unlawful means; which the furnishing a slave with such a paper, by means whereof he escaped from the service of his owner, would be. "The false making," therefore, of that instrument, by which *Johnson* and the appellant might have been so injured, was a forgery at common law, for which the defendant, if guilty, would have been punishable by indictment, though it does not appear, that any body was actually injured thereby, which is not necessary to constitute forgery; and it is not like the case of a mere cheat, to constitute which, there must be a prejudice received: hence it follows, if this concise view of the subject be correct, that the words spoken by the appellant, as laid in the declaration, charging the defendant in error with having forged that instrument, are actionable, and that the demurrer was properly overruled.

JUDGMENT AFFIRMED.

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TRASHER, Garnishee of SHAWEN vs. EVERHART, a. d. b. n.
of WALTMAN.—December, 1831.

In attachment causes, as against the garnishee, according to our practice, the short note filed at the time of issuing the attachment, is substituted for a declaration.

It is in general true, that foreign laws are facts which are to be found by the jury; but this rule is not applicable to a case in which the foreign laws are introduced for the purpose of enabling the court to determine, whether a written instrument is evidence. In such case, the evidence always goes in the first instance, to the court, which, if the evidence be clear and uncontradicted, may, and ought to decide, what the foreign law is, and act accordingly.

If what the foreign law is, be matter of doubt, the court may decline deciding it, and may inform the jury, that if they believe the foreign law attempted to be proved, exists, as alleged, then they ought to receive the instrument in evidence, if not, they should reject it.

In an attachment cause, upon a short note in *assumpsit*, the plaintiff proved a single bill of the debtor, as his cause of action, and proposed to prove to the jury, that the instrument of writing in question, was executed in Virginia, for the purpose of showing, that by the laws of that State, a single bill is not a specialty. The County Court permitted the evidence to go to the jury. **HELD**, upon appeal that the evidence was for the court exclusively.

It is an universal principle, governing the tribunals of all civilized nations, that the *lex loci contractus* controls the nature, construction, and validity of the contract. The exceptions are, where it would be dangerous, against public policy, or of immoral tendency, to enforce that construction here.

The *lex loci contractus*, is never looked to, to determine the remedy which should be used, and the process to be issued, to enforce a contract. These are determined by the *lex fori*. So an action of *assumpsit* cannot be maintained here, upon a single bill made in Virginia, which, according to the laws of that State, is not a specialty, but according to our law, is.

From the earliest period of our judicial history, a scrawl has been considered as a seal. It is not necessary that it should be adopted by the obligor, by a declaration in the body of the bond or single bill, to make it his seal. It is sufficient, if the scrawl be affixed to the bond or bill, at the time of its execution or delivery; and that is presumed (in the absence of other proof,) from the fact that the obligee is in possession of an instrument, with a scrawl attached to it.

APPEAL from Frederick County Court.

On the 18th of March, 1828, the appellee, *Joseph Everhart*, as administrator *d. b. n.* with the will annexed, of *Jacob Waltman*, obtained a warrant for an attachment, against the

lands and tenements, goods and chattels, of *David Shawen* and *George W. Shawen*, and at the time of filing the same, exhibited the following short note: "Action of *assumpsit* in *Frederick County Court*. The plaintiff's cause of action in this case, arises upon a joint promissory note, bearing date the seventeenth day of September, in the year 1822, whereby, two years after date, the defendant promised to pay to the said *Jacob Waltman*, in his life-time, or order, the just and full sum of \$372, with interest thereon from the date hereof, for value received; which said sum, with the interest thereon accrued, is still unpaid and unsatisfied, except in so far as the same is credited, and to recover the balance, whereof amounting to the sum of \$338 82, this suit is brought." &c. Upon the return of the attachment, the appellant, *Archibald Trasher*, appeared as garnishee, and pleaded *non assumpsit*, and that the property levied on belonged to him, and not to the said *David* and *George W. Shawen*. Issues were taken to the these pleas.

1. At the trial the plaintiff offered to read in evidence to the jury, the following instrument of writing, being the same on which the present proceeding is founded. "\$372. Two years after date; with interest from this date, we promise to pay to *Jacob Waltman*, or order, the just and full sum of three hundred and seventy-two dollars, for value of him received, this 17th day of September, 1822; *David Shawen*, (sl.) *George W. Shawen*, (sl.)" The admissibility of which, being objected to by the defendant, upon the ground that it was a single bill, and not the foundation of an action of *assumpsit*, the plaintiff then offered to prove to the jury, by a competent witness, that the instrument of writing in question was executed in *Virginia*, for the purpose of showing, that by the laws of that State, the said instrument is a promissory note, and not a single bill; the defendant thereupon objected, that the said evidence was not proper for the jury, but should be directed to the court. This last objection was overruled, and the evidence submitted to the jury; the defendant excepted.

2. After having proved that said instrument was executed in *Virginia*, and it having been admitted, that by the laws of that *State*, it would there be considered and treated as a promissory note; the defendant objected, that in *Maryland* it was not evidence in an action of *assumpsit*, but the court overruled the objection, and permitted the instrument to be read to the jury. The defendant excepted, and the verdict and judgment being against him, he appealed to this court.

The case was argued before STEPHEN, ARCHER, and DORSEY, J.

Palmer, for the appellant, contended, in this case three questions are presented for the consideration of the court. 1. In this State, a scrawl, or a mark made with a pen, in the form of a seal, is *per se*, a seal, and that it is not necessary to be expressed in the body of the instrument, that it was the intention of the parties to give it the effect of a seal. This question depends upon a uniform practice and usage in this State, sanctioned by our courts, and acquiesced in by all classes of the community, from the earliest history of the State. It has always been considered by the profession in *Maryland*, that a scrawl with a pen of L. S. at the end of the name, is a seal, and to have the same effect as wax. It has become the common law of the State, and to disturb a practice and usage so uniform, and of such long duration, would, in all probability, be productive of great mischief, by affecting titles, and destroying vested rights. It is admitted, that a scrawl with a pen, would not, in *England*, constitute a seal, and would not be noticed as such, even if it were expressed in the body of the instrument, that the parties intended it as such. In *England*, "a seal is wax, with an impression." *Coke*, 3 *Inst.* 169. *Perkins*, sec. 134. 2 *Leon.* 21. Before the conquest, the *English* did not seal with wax, but they usually made a cross of gold on the parchment, and sometimes an impression on a piece of lead. *Jac. Law Dic. seal.* In the time of *Wm. I.* the

king and the nobility used seals of arms, which were afterwards followed by the gentry; and in the reign of *Edw. III.* seals with devices, became common with all sorts of persons. 2 *Nelson*, 207. It would seem to follow, that “wax with an impression,” was not used anciently in *England*, but that usage and custom, of later years, have made wax necessary for a seal. Wax, in *England*, is *per se*, a seal, and requires no expression in the body of the instrument, to show that the parties intended it as such. This case must be decided either according to the common law of *England*, or the usage, or common law of this *State*. If the former is to govern, the scrawl cannot be noticed as a seal, nor considered as such, as wax is necessary to constitute a seal; and the expression in the body of the instrument, showing the intention of the parties, could make no difference. It is not the expression in the body of the instrument, that constitutes the scrawl a seal, but it is the scrawl itself, being substituted for wax, by usage and practice in this *State*. The decisions of our sister States upon a question like the one before us, can have no influence upon the court. The different States have decided the question according to their local law and customs. *New York* is the only State, it is believed, that has adhered to the common law—wafer or wax is required in that State. *Warren vs. Lynch*, 5 *Johns.* 240. In *Pennsylvania*, a scrawl with a pen is *per se*, a seal, and requires no expression in the body of the instrument, to shew the meaning of the parties. *Taylor vs. Glaser*, 2 *Serg. and Rawle*, 504. *Long vs. Ramsay*, 1 *Serg. and Rawle*, 72. *McDill vs. McDill*, 1 *Dall.* 63. In *Virginia*, to constitute a scrawl a seal, an expression in the body of the instrument is necessary, to shew the intention of the parties. *Jones vs. Temple and Logwood*, 1 *Wash. Va.* 42. *Blair vs. Blairgrove*, *Ib.* 170. *Austen Ex’r. vs. Whitlock*, *Ex’r.* 1 *Mun.* 487. *Anderson vs. Bullock, et al.* 4 *Ib.* 442. In *New Jersey*, a written scrawl is not good as a seal, except upon instruments for the payment of money. 1 *Hals.* 169. *Sou.* 449. In *S. Carolina*, wafer or wax is not necessary

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to make a seal, but a scrawl with a pen, including L. S. in the hand writing of the obligor, is a seal. *Ralph and Co. vs. Gist*, 4 *McCord*, 267. *U. States vs. Coffin, Bee*, 140.

2. When a question occurs before a court of law, whether certain evidence be competent or not, the determination of which depends upon certain preliminary facts, those facts must be decided by the court, and the evidence of such preliminary facts, are not admissible and proper to go to the jury. *Claytor vs. Anthony*, 6 *Ran.* 285. *Jackson vs. Frier*, 16 *Johns.* 193. 2 *Philips' Ev.* 88. No evidence is proper to go to the jury, unless it be to prove the truth of the facts in issue. The admissibility of such evidence would be calculated to mislead the jury. The object of the evidence offered in this case, was not to prove any fact in issue between the parties, but to lay the foundation for the admissibility of evidence to prove the facts in issue, as a preliminary fact upon which the competency of the evidence depended. The law of *Virginia* in relation to the contract in question, was not in issue to the jury in this case; it is a preliminary fact, to be decided by the court, before the contract can be admitted to the jury in this form of action; and before the jury can act upon the case. The only question then is, whether the court or the jury are to decide the preliminary fact, as to the law of *Virginia*? How could the jury decide such a fact, before the contract was admitted to go to them? The competency of the evidence must be decided upon before the jury retire to act upon the case, which precludes the idea that the evidence of the preliminary fact ought to be addressed to the jury. This question is precisely like that of the lost bond. The case of *Jackson vs. Frier*, 16 *Johns.* 193, is decisive of this case. The evidence ought to have been addressed solely to the court.

3. An action of *assumpsit* cannot be sustained in this State upon a sealed note, or specialty, executed in the State of *Virginia*; although an action of *assumpsit* would be the proper form of action in that State; debt is the proper form

of action here. The law of the place where a contract is made, or to be performed, is to govern as to the nature, validity, construction, and effect of such contract: but the remedy, or the manner of enforcing such contract, is to be governed by the *lex fori*. The rights of the parties, and remedy, have frequently been confounded, and the profession has found great difficulty in running a practical line between cases of the *lex loci contractus* and the *lex fori*. But it is now clearly settled, that the form of the action, the pleadings, and all judicial proceedings, in relation to contracts, are to be governed by the *lex fori*. If the remedy was to be governed by the law of the place where the contract was made, it would be difficult for counsel to know what form of action to bring upon foreign contracts; and, in truth, they could not institute suit with safety, until they took time to ascertain the mode of judicial proceeding, of the State or country where the contract in question was made. This would lead to endless difficulty and delay, and in many instances, impede the creditor from a speedy action, to the loss of his claim. The principles contended for in this case, are fully sustained by the highest judicial tribunals in this country and England. *Andrews and Jerome vs. Herriot*, 4 Cowen's Rep. 508. *Decouche vs. Savetier*, 3 John's Chan. Rep. 202. *Whitemore vs. Adams*, 2 Cowen's Rep. 626. *De Sobray vs. De Laistre*, 2 Harr. and Johns. 228. *Dixon vs. Ramsay*, 3 Cranch's Rep. 323. *Sicard vs. Whale*, 11 Johns. Rep. 194. *Pearsall, et al. vs. Dwight, et al.* 2 Mass. Rep. 89. *Nash vs. Tupper*, 1 Caine's Rep. 402. *Duplein vs. De Roven*, 2 Vern. Rep. 540. 3 Esp. Rep. (note) 164. The dispute in this case is, whether the action shall be debt or *assumpsit* upon the contract in question. As to the form of action, the court cannot look beyond the contract itself. The right of the parties and the effect of the recovery, will be the same in either form of action. *Andrews vs. Herriot*, 4 Cow. Rep. 510. The only case to be found, which teaches a different doctrine, is the case of *Meredith vs. Hinsdale*, 2 Cain's

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Rep. 362, which was much shaken by the decision of *Warren vs. Lynch*, 5 *John. Rep.* 237, and expressly overruled by the case of *Andrews vs. Herriott*. In the case of *Adams vs. Kerr*, 1 *Bos. and Pall.* 360, this question was brought before the court, but the case was compromised before decision. In *Connecticut*, promissory notes and bonds are put upon the same footing; but when an action is brought in the courts of *New-York*, the creditor is told by the court, that they consider the contract of a different nature; that what he took as a specialty, shall be no more than a simple contract debt. This is changing the nature of the contract, as it relates to the remedy; but not as to the rights of the parties. *Lodge vs. Phelps*, 1 *John's Cases*, 139. 2 *Cain's Cas. Error.* 321. The same principle is decided in *Milne vs. Graham*, 1 *Barn. and Cresw.* 192. The statutes of limitations, of a foreign State or country, are in no case pleadable in our courts; but our own statutes of limitations are applicable to all actions. The cases which have been decided upon this subject, are decisive of the question under consideration; they all clearly go to show that the form of the action, and the pleadings in the cause, must be governed by the *lex fori*, and not the *lex loci*. *Tappan vs. Poor*, 15 *Mass. Rep.* 419. *Ruggles vs. Keeler*, 3 *Johns. Rep.* 263. *Harper vs. Hampton*, 1 *Harr. and Johns. Rep.* 453. *Ib.* 612. *Graves vs. Graves*, 2 *Bibb. Rep.* 207. *LeRoy vs. Crowninshield*, *Mason's Rep.* 151.

W. Schley, for the appellee. 1. The evidence of what was the law of *Virginia*, the place where the note was made, was properly submitted to the jury. *De Sobry vs. De Laistre*, 2 *Harr. and Johns.* 229. But if the evidence on that subject should have been addressed to the court, the allowing it to go to the jury is not the ground for the reversal of the judgment. *Jackson vs. Frier*, 16 *Johns. Rep.* 196. If the evidence was adequate to establish the fact, the party is not prejudiced, and has, therefore, no right to complain. It was proved, or admitted, that according to

the laws of *Virginia*, the instrument sued on was a promissory note, and the question upon this exception is, could it be offered in evidence, to support the issue on the part of the plaintiff. 2. It has never been decided in *Maryland*, that a mere scrawl, affixed to the signature, *per se*, constituted what would otherwise be a note, a bill obligatory. There must be some expression in the body of the paper, showing that the party adopts it as his seal. In *England*, there must be an impression on wax ; and the same is the law in all the States north of *New Jersey*. 4 *Kent's Com.* 444. The early practice in *Maryland* was in conformity with the common law of *England* ; and the custom of adopting the scrawl being in derogation of that common law, should not be enlarged. If the mere scrawl makes an instrument a specialty, then a party who holds a note barred by limitations, or wishing to exclude inquiry into its consideration, may easily effect his purpose, by affixing one to the signature. 3. But in this case, it is immaterial what the rule upon this subject may be,—the instrument, by the *lex loci contractus* is a promissory note ; it is then a promissory note here, and the remedy adopted, for the recovery of such a claim, in our courts, is that, which has been adopted in this case. Considering this a note, the *lex fori* prescribes the action of *assumpsit*, for the enforcement of the obligation which it creates. If, by the law of *Virginia*, *covenant* was the proper form of action on a promissory note, would it be contended that if a suit was brought in *Maryland*, on a note made in the former State, that, that form of action should be pursued. Where no place of performance is specified in the contract, the legal presumption is, it was intended to be performed at the place where it was made. *De Sobry vs. De Laistre*, 2 *Harr. and Johns.* 219. Now, as in the note in question, no place of performance is designated, the parties are to be presumed to have contemplated its performance in *Virginia*. It was there made, and intended to be treated, as a *simple contract*. The obligation of such a contract was designed to be created, and none other. Its *consideration*, according

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to the views of the parties, was to be open to examination; and yet it is contended, that by resorting to the courts of a different jurisdiction, you exalt this simple contract, into a specialty, and thereby exclude any such inquiry. On this point, he cited *De Wolf vs. Johnson*, 10 *Wheat.* 367. *Harrison vs. Sterry*, 5 *Cranch*, 298. *Camfranque vs. Burnell*, 1 *Wash. C. C.* 340. *Willing and Francis vs. Consequa*, 1 *Peter's C. C.* 301. *Andrews vs. Herriott*, 4 *Cowen*, 511. (*note.*) *Meredith vs. Hinsdale*, 2 *Caines*, 362.

ARCHER, J., delivered the opinion of the court.

This was an attachment issued at the suit of the plaintiff, to affect the goods of the defendant, for the purpose of satisfying a debt, alleged to be due from the defendant to the plaintiff. The short note, which accompanied the *capias*, stated the cause of action to be a joint promissory note of the defendants, given to the testator of the plaintiff. The substance of the short note is referred to, because, according to our practice, it is substituted in this kind of proceeding for the declaration, and because the questions in this cause, grow out of the form which the short note has assumed. The *garnishee* appeared, and pleaded *non assumpsit*, and property in himself to the goods attached, and issues having been joined, and the court having refused permission to the plaintiff to read in evidence the cause of action, upon the ground that the same was a specialty, and not a promissory note, he then offered in evidence to the jury, that the cause of action was executed in *Virginia*, for the purpose of showing, that by the laws of that State, it was a promissory note, and not a single bill. It is contended, that in the admission of this evidence to the jury, the court committed an error, and that it was evidence for the court, and not for the jury. It is, in general, true, that foreign laws are facts which are to be found by the jury; but this general rule is not applicable to a case, in which the foreign laws are introduced for the purpose of enabling the court to determine whether a written instrument is evidence. In such case,

the evidence always goes in the first instance to the court, which, if the evidence be clear and uncontradicted, may, and ought to decide what the foreign law is, and according to its determination on that subject, admit or reject the instrument of writing as evidence to the jury. It is offered to the court to determine a question of law—the admissibility or inadmissibility of certain evidence to the jury. It is true, if what the foreign law is, be a matter of doubt, the court may decline deciding it, and may inform the jury, that if they believe the foreign law, attempted to be proved, exists, as alleged, then they ought to receive the instrument in evidence: on the contrary, if they should believe that such is not the foreign law, they should reject the instrument as evidence. We collect from the bill of exceptions, that the object of the plaintiff in introducing this evidence of the laws of *Virginia*, was to let the instrument of writing, which was the cause of action, in, as evidence to the jury. He could have had no other object. This being the case, it was evidence for the court, and not the jury, unless the court had thought proper, in case of doubt about the evidence, to have ultimately submitted it to the jury: and that is like a case of very common occurrence in trials at *nisi prius*, where a deed is produced, and evidence of its execution is adduced, in order to let it go to the jury; such evidence is always addressed to the court, and they determine its admissibility upon such evidence, unless in cases where the evidence of its execution is doubtful, in which case the court will let the deed go to the jury with the evidence offered of its execution, informing them that they are to receive it in evidence, if they shall believe it to have been executed, but if they should believe it was not executed, they must reject it; or, in other words, not consider it as evidence in the cause. And in all cases of the like character, the evidence is for the court in the first instance; the object being to ascertain whether certain testimony offered is, in point of law, competent and proper for the consideration of the jury. But it may be asked upon another ground,

whether the court were right in permitting the evidence of the law of *Virginia* upon this subject, to go to the jury, as the history of the cause shows it was offered to let in the instrument of writing as evidence. Was it material to the determination of that question? This question must be answered by the decision of another; whether the foreign law, or the domestic law, should, in this proceeding, regulate and fix the character of the instrument. This subject will be reviewed and examined, in the consideration of the second bill of exceptions.

In the second bill of exceptions, the court permitted the plaintiff to read in evidence to the jury, the cause of action, having first proved its execution, it being admitted that it was, by the laws of *Virginia*, where it was executed, a promissory note. The plaintiff's counsel in support of the opinion of the court, as expressed in this bill of exceptions, endeavors to sustain his case, by the maintenance of one or the other of the following propositions.

1st. That the evidence was admissible, because being executed in *Virginia*, it was a promissory note there; and that the law will so treat it here.

2d. That if wrong in this, it is by the laws of this *State* a promissory note, and ought to have been received to sustain the issue.

As to the first proposition, its truth depends on this; whether the *lex loci contractus*, or the *lex fori*, is to govern? It is a universal principle, governing the judicial tribunals of all civilized nations, (for the truth of which no authority need be cited,) that the *lex loci contractus* controls the nature, construction, and validity of the contract: courts will always look to the *lex loci*, to give construction to an instrument, and will impart to it validity, according to those laws, unless it would be dangerous, against public policy, or of immoral tendency to enforce it here. They will also look to those laws, to ascertain the nature and true character of the contract, that efficacy may be given to its obligations between the parties, but they never look to the *lex*

loci to determine the remedy which should be used, and the process issued to enforce its obligations: these are always determined by the *lex fori*. The law demands that a discrimination should be made between the rights and the remedy. In the ascertainment of the former, the *lex loci* becomes the rule; the latter is controlled by the *lex fori*. It must be always immaterial to the creditor, in what manner his claim is enforced, whether as a simple contract, or as a specialty, so that his essential rights are protected in the one form of action, as well as in the other. As in the present case, in what manner are the rights created, and obligations incurred, affected by treating the instrument as a single bill; although, according to the law of the place, it is a promissory note? In an action of debt, its obligations are held equally sacred, and in the same manner enforced, as if the action had been *assumpsit*. If there were no other reason for the rejection of the doctrine contended for, it might be sufficient to say, that it would be a great inconvenience to fashion the remedy according to the character of the contract impressed upon it, in the country where it is made, or to be performed. Inquiries would, in all cases, have to be instituted, before a suit could be commenced, into foreign laws, to determine the nature of the remedy to be pursued, which, in many cases where evidence was not at hand, might be attended with great delay and difficulty, and consequent loss of the debt. These views are opposed by the case of *Meredith vs. Hinsdale*, 2 Caine, 362, in which the court adjudged, that an instrument being a specialty by the laws of *Pennsylvania*, although it was not such by the laws of *New York*, yet that it ought to be received as a sealed instrument, and that an action of debt would lie upon it. But this determination has been expressly overruled in *Andrews and Jerome vs. Herriott*, 4 Cowen, 508, in which the court say, that *Meredith vs. Hinsdale*, was decided without attention to the distinction, that the *lex loci contractus* governs only as to the construction of the contract, and has nothing to do with the remedy, which

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is controlled by the *lex fori*. The dispute is merely upon the remedy; that is to say, whether the action shall be covenant, or *assumpsit*, upon a given contract between two persons within the jurisdiction of the court. The substance and effect of the recovery, is the same in either form, and they say, they cannot sanction the case of *Meredith vs. Hinsdale*, without overturning the entire class of cases which distinguishes between the *lex loci* and *lex fori*. According to these views, the character of the instrument must be regulated by a reference to our domestic law. But conceding that the first proposition cannot be sustained, it is contended that the instrument of writing is not a specialty, but a promissory note, by the laws of this State, and that the court therefore correctly permitted it to be given in evidence, under the issue of *non assumpsit*.

From the earliest period of our judicial history, a scrawl has been considered as a seal, and it would be too late at this day, and would be attended with consequences too serious, to permit it to be questioned. It is not necessary, as has been argued, that the scrawl must be adopted by the obligor, by a declaration in the body of the bond, or single bill, to make it his seal. It is sufficient if the scrawl be affixed to the bond, or bill, at the time of its execution and delivery. For, if he execute and deliver it with the scrawl attached, it being considered here as equivalent to the wax or wafer, it is as much his seal, as if he had declared it to be so in the body of the instrument. The fact of the clause of attestation not appearing in the usual form of "*signed, sealed and delivered*," can, in reason, make no difference: for the question always is, is this the seal of the obligor? and if he has delivered it, with the scrawl attached, it is his seal, and must be so considered: for whether an instrument be a specialty, must always be determined by the *fact*, whether the party affixed a seal; not upon the *assertion* of the obligor, in the body of the instrument, or by the form of the attestation. In this case, the execution of the bill is admitted, and the plaintiff has possession of it, which is

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evidence of delivery ; and there is nothing to show that the scrawl was not attached, when it was executed and delivered, and the presumption always would be, that the seal was affixed to the instrument on its delivery, in the absence of evidence to the contrary.

JUDGMENT REVERSED.

**BELT, use of BOSWELL, et al. vs. WORTHINGTON, et al.—
December, 1831.**

Where a replevin had been struck off upon the motion of the plaintiff, and an action upon the replevin bond had been instituted, the defendants, (the plaintiff in replevin and his securities) suffered judgment to go by default; they were, notwithstanding, permitted, upon the execution of a writ of inquiry, to assess the plaintiff's damages, to show they had title to the articles replevied, in mitigation of damages.

The object of the law in prescribing that a replevin bond should be entered into by a plaintiff before he should have the writ, was only to indemnify the defendant. The action upon that bond being *sui generis*, ought to be so moulded as best to subserve the principles of justice, having a regard to the rights decided in the replevin, and the nature and character of the bond.

APPEAL from Prince Georges County Court.

This was an action of *Debt*, commenced the 25th November, 1828, by the appellant, *Edward W. Belt*, against the appellees, on a replevin bond, dated July 16th, 1828. To the plea of general performance, the plaintiff replied : that the defendants, on the day of the execution of the bond, prosecuted and sued forth, out of the county court, the writ of replevin, to an *elisor* of the county (appointed in that behalf) directed, commanding him to replevy and deliver to the defendant, thirty thousand pounds of tobacco, which the said *Edward W. Belt*, of the county aforesaid, sheriff, had taken, and unjustly detained, &c. That the said *elisor*, as by the writ commanded, did replevy, and deliver to the defendants, the said tobacco ; and that at the return term of the same, the parties appeared, when the attorney of the

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defendants, then then and there dismissed, discontinued, and struck off their writ and suit aforesaid; and so the plaintiff says, that the defendants have not well and faithfully performed the condition of the said bond, &c. The defendants suffered a judgment to go against them by default to this replication; and upon the execution of a writ of inquiry at bar, to assess the plaintiff's damages, a record of the proceedings in the replevin suit referred to in the replication, was read in evidence by the plaintiff, showing that the same was stricken off upon the motion of the defendants' attorney. The plaintiff also, by consent of parties, read to the jury the schedule and appraisement, returned by the *elisor*, who executed the replevin, as evidence of the quantity and value of the tobacco replevied. The defendants then offered to prove, in mitigation of damages, that at the time of the issuing out of the said writ of replevin, they had a good title to the tobacco. The plaintiff objected to the competency of this evidence, upon the ground—1st. that the effect of admitting it, would be to try the question of title, in a collateral manner; and, 2d, that the defendants having permitted a judgment to go against them by default, in the present action, were thereby concluded, from going into such an enquiry. But the court (STEPHEN, Ch. J., and KEY, A. J.) overruled the objections, and permitted the evidence to go to the jury. The plaintiff excepted, and the verdict being but for nominal damages, he brought the present appeal.

The cause was argued before BUCHANAN, Ch. J., and EARLE, ARCHER, and DORSEY, J.

Alexander, for appellant.

It is an universal principle, that a person shall not be permitted to gain an advantage by violating the legal rights of another, or by evading the performance of a legal duty. The origin of all laws inflicting costs, damages, fines, and corporal punishments, is to compel every one to observe his duty towards his fellow citizens and the public. But this

principle seems to have been overlooked by the court below. The judgment for a return, legally and morally bound the plaintiff to restore the possession to the defendant. The writ *de retorno habendo* was intended to enforce this obligation, and the replevin bond was designed to afford the defendant an additional security, for the performance of such judgment as might be rendered. If then, the property is removed, so that the defendant in replevin is compelled to sue on the replevin bond, the measure of his damages should be the value of the property which the plaintiff, in replevin, was adjudged to restore. By adopting this measure, the plaintiff will be deprived of all inducement to *eloign* the property, or in any manner to resist the execution of the judgment for a return. But it is said that the action of replevin is *sui generis*, and this may be affirmed of every action; but all actions have this common design, to administer justice between the parties. It is said the *non-suit* does not settle the title, which was therefore liable to be questioned in another suit. In the first place, it is answered, that a writ of replevin will not lie after a non-suit in a former replevin. The action of replevin is therefore *sui generis*, so far that a non-suit is a conclusive bar in any subsequent action. In the next place, the judgment for a return consequent upon the non-suit, is conclusive of the right of the defendant to a restitution. The condition of the bond is, that the property shall be returned if a return shall be adjudged. The judgment must, therefore, conclude the obligor from alleging any matter beyond the judgment, as a justification for delaying the return; it is equally conclusive as to the damages. It may be said, that the possession of the defendant in replevin may have been qualified, his title may have been defective, and he ought not to require damages to a greater amount than the fair value of his interest in the property. The plaintiff may avoid excessive damages by complying with the judgment; if he will retain it against the judgment, he ought not to be permitted to speculate upon the nature of the defendant's title, in order to lessen the damages. The replevin, in this

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State, issues upon a mere suggestion of title in the plaintiff; it transfers the possession from the defendant to the plaintiff, and may, therefore, be made an instrument of great fraud, if the plaintiff, after a judgment against him, may rely on his possession thus obtained, and compel the defendant to show a clear title, in order to obtain damages to the value of his interest; and the objection loses all its weight, when it is considered that the damages recovered will be held by the defendant in lieu of the property, and subject to all claims which existed against the property itself. There is no case of an action founded on contract, in which evidence has been admitted in mitigation of damages. In some actions of *tort*, as for libel, slander, and such like, in which there can be no certain measure of damages, matter which extenuates the moral turpitude of the injury, may be offered in mitigation, as matter which increases its moral enormity, may be offered in aggravation of damages. Such evidence is admitted upon a very clear principle; it is necessary to determine the precise character of the wrong which is to be redressed by the recovery of damages; but in this case, the value of the property furnishes the best measure of damages sustained by the party who is adjudged to be entitled to the return; and more particularly, as the action is brought upon an express contract to comply with the judgment for a return. In an action upon an appeal bond, the merits of the original judgment cannot be questioned in mitigation of damages; and for this plain reason, that the defendant has bound himself to pay the judgment, in case it should be affirmed. It is said there is a difference between the cases; but the distinction can be asserted more readily, than proved. If any evidence in mitigation can be offered in an action upon the replevin bond, it must be on the ground, that the action is a continuation of the action of replevin; but property might have been pleaded in bar by the plaintiff in replevin, and it is a general rule, that matter which might be pleaded, shall never be offered in evidence in mitigation of damages. It is upon this principle, that matter which

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might have barred the original judgment, is not admissible in an action upon the appeal bond. It is not necessary to show that the defence was actually pleaded; if, therefore, the evidence is admissible in the present case of a non-suit, it must be equally admissible in the case of a judgment rendered upon verdict.

Johnson for the appellees.

The question to be discussed is, is a plaintiff in replevin, who fails to prosecute his suit with effect, liable for the whole amount of the property in controversy? The object of the replevin bond is to put the defendant in the situation he would have stood in, if no suit had been brought, or in other words, to indemnify him against the consequences of the suit. Suppose there had been a *retorno habendo* awarded the defendant in replevin, and plaintiff had subsequently *non-prossed* his action; will it be pretended, that in an action on the replevin bond, the defendant in the last action could not give in evidence those facts, for the purpose of protecting himself against a judgment for the full value of the property? the only effect of suffering a default, in an action on the bond, is to admit, that plaintiff had a right to sue upon it: it admits the right of possession in the property replevied, to have been in the present plaintiff, and no more. Suppose the owner of a slave hires him to a third person for a certain period, and within the period replevies him, and afterwards non-suits his action; will it be said, that in an action on the replevin bond by the hirer, the owner could not prove title, to prevent a recovery against him for the full value of the slave; if he could not, then the replevin bond, instead of being a mere indemnity, would place the hirer in a better condition than if no suit had been brought; he would recover the full value of the negro, when he had but a temporary right to his services. The effect of a judgment by confession, or *nil dicit*, in an action upon a bond with a collateral condition, is not to entitle the party to the amount of the penalty, but only to the damages

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actually sustained; and any evidence showing or limiting the extent of the damages, is proper for the jury. The proof in this case, was not to defeat the action, but simply to mitigate the damages. He referred to 6 *Harr. and Johns.* 469.

ARCHER, J., delivered the opinion of the court.

The judgment by default in the replevin bond against the defendant, only admits, that he did not prosecute his writ of replevin with effect; and it is incumbent on the plaintiff in the action, to show the damage which he has sustained by the failure to prosecute. For this purpose, he has offered in evidence, the proceedings in replevin, in which the bond was taken, by which it appears that the replevin was executed, and the goods delivered to the defendants, and that instead of prosecuting the writ with effect, the suit was, by their order, stricken off. Upon the execution of the writ of inquiry, the plaintiffs sought to recover the value of the goods, which, from the proceedings, appear to have been delivered to the defendants, and not returned; and in mitigation of the damages, the defendants offered evidence to show title in them, to the goods, at the time of the replevin sued out. Its admissibility has been questioned, which forms the subject for our consideration. If the judgment of *non-suit*, which followed, or ought to have followed, the order to strike off the suit in replevin, had been conclusive of the rights of the parties to the property in controversy, the evidence would have been clearly inadmissible. But we apprehend, that no right has been settled between the parties to the suit, which should induce the rejection of the evidence. The right to have the return of the goods, is the only consequence of the judgment. The title to the goods is in no manner settled by it, and the defendant could not, therefore, be estopped by the proceedings, from an effort to mitigate the damages, by setting up a title to the goods. The object of the law in prescribing that a replevin bond shall be entered into by a plaintiff, before he should have

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the benefit of the writ, was only to give indemnity to the defendant. If, in truth, he had no right to the property, at the time of the institution of the suit, the rejection of the evidence, by putting it in his power, to recover the value of the goods, would enable him to overreach a just measure of indemnity, and inflict upon the plaintiff a penalty which the law never contemplated. No argument can be deduced against the admissibility of this evidence, from the principles applicable to recoveries on appeal bonds, taken from actions on money contracts, where the judgments, by default, are as conclusive as upon verdicts; because, in the proceedings in the replevin suit, which gave rise to this replevin bond, nothing has been done which is at all conclusive upon the parties, with regard to title; and the action of replevin, being an action *sui generis*, the recovery on the replevin bond, ought to be moulded in such a manner as will best subserve the principles of justice. Whether such evidence would have been admissible, had the pleadings in the action of replevin assumed other forms, it is not proper now to determine. We may be permitted, however, to say, that the question must always be regulated by a reference to the rights decided in the action, and the nature and character of the bond.

JUDGMENT AFFIRMED.

YATES and McINTYRE vs. O'NEALE and SMITH.—*December, 1831.*

The act of 1821, ch. 232, was not designed to prevent the mere sale of lottery tickets, or to impose upon the seller the necessity of obtaining a license therefor. Its prohibitions only extend to the opening, setting up, exercising, or keeping any office or other place, for selling lottery tickets, or registering the numbers, or publishing the setting up, &c. without having first obtained a license for that purpose.

A contract between A and B, by which the latter agreed to become the agent of the former, for the sale of lottery tickets, account for, and remit a

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certain part of the sales of tickets, return unsold tickets, and bear the expenses of the agency, is not void under the act of 1821. There is nothing in such a contract, upon any principle of construction applicable to penal statutes, that could warrant a jury in inferring that the agent had agreed to open an office, &c. of the character described in the act; and the court will not presume that A intended to violate that law, by having an office kept without a license.

APPEAL from *Frederick County Court*.

This was an action of *Assumpsit*, instituted by the present appellants, against the appellees, on the 31st of July, 1826, upon the following written contracts: "Know all men by these presents, that we, *H. G. O'Neale* and *Jonas Smith*, are held and firmly bound unto *John B. Yates* and *Archibald McIntyre*, in the penal sum of \$1,000, to be paid to the said *Yates and McIntyre*, or either of them, or their certain attorney, heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, &c. Witness our hands and seals, this 24th day of June, 1824. Whereas, the above bounden *H. G. O'Neale* has undertaken, as agent for the above named *Yates and McIntyre*, to vend lottery tickets, for which he is to receive a certain allowance, as agreed upon between them and the said above bounden *H. G. O'Neale*; and has also agreed to make due returns of such money as he shall receive for said tickets, and sell them at such prices as he may from time to time be directed by them, or their agent residing in *Baltimore*: now therefore, the condition of the above obligation is such, that if the above named *H. G. O'Neale* shall well and faithfully perform his duty, as agent aforesaid, pursuant to the instructions he shall from time to time receive, and duly return all the money which he shall receive for lottery tickets, or shares, as soon as received by him, then this obligation to be void, or else to remain in full force. *H. G. O'Neale, Jonas Smith.*"

"Memorandum of agreement between *H. G. O'Neale* and *John B. Yates*, and *Archibald McIntyre*, by *S. Scribner*, their agent, made this 24th of June, 1824. The said *H. G. O'Neale* agrees to sell lottery tickets for said *Yates and*

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McIntyre, for cash only, and return to their agent in *Baltimore* all such money, as he shall, from time to time, receive for them, by mail, unless otherwise directed. And he also agrees to return to the office in *Baltimore*, by mail, if not otherwise directed, all such tickets as shall remain unsold, at such time previous to the drawing, as he shall be directed by the said *Yates and McIntyre*, or their agent residing in *Baltimore*. And the said *Yates and McIntyre* agree to allow the said *H. G. O'Neale*, for all the tickets he shall so sell and remit, the money for one-half the advance price for which they shall sell, over and above the scheme price of the tickets; the business of the agency, and expenses thereof, to be borne by the said *H. G. O'Neale*, except the postage, which is to be charged equally to both the parties. *H. G. O'Neale. S. Scribner*, agent for *Yates and McIntyre*."

It was admitted that the defendant, *H. G. O'Neale*, as agent of the plaintiffs, after the execution of the said instrument of writing, received from the plaintiffs sundry lottery tickets, and shares of lottery tickets, in a certain lottery thereafter to be drawn, and which lottery was authorised by an act of assembly of this State, and that he vended and disposed of said tickets, as such agent, in the town of *Middletown*, in *Frederick* county, and received from the vendees respectively, the prices thereof: and that on the 23d of September, in the year 1825, he was in arrears in the sum of \$398 25, for money by him previously received, for tickets by him previously sold, as such agent, and for which he had not returned the money to the plaintiffs, or their agent, or in any way paid, or accounted for the same. The plaintiffs also proved, by a competent witness, that afterwards, and after the determination of such agency, the defendants acknowledged that the said sum was in arrear as aforesaid, and promised to pay the same within two weeks thereafter, and that the same money and every part thereof, is yet unpaid. The plaintiffs here rested their case. The defendants then prayed the court to instruct the jury, that the plaintiffs are not entitled to recover in

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this cause from the evidence offered; because the contract on which the suit is brought, is void, by virtue of an act of assembly of this State, passed at December session, 1821, *ch.* 232, which instruction the court (SHRIVER, and Th. BUCHANAN, A. J.) gave. The defendant excepted.

2. The plaintiffs then, upon the facts stated in the foregoing bill of exception, prayed the court to instruct the jury, that if they shall believe from the evidence in the case, that *H. G. O'Neale*, as such agent, was in arrear to the plaintiffs, in the sum of \$398 25, and that afterwards the defendants acknowledged the said sum to be due to the plaintiffs, and promised to pay the same to the plaintiffs within two weeks thereafter, and that they have failed to do so, and that the same is yet due; then the plaintiffs are entitled to a verdict for such sum as the said sum of \$398 25, with interest from the day of the impetration of the writ in this cause, shall amount to. Which instruction the court refused to give, and the verdict and judgment being for the defendants, the plaintiffs appealed to this court.

Wm. Schley, for appellant.

1. The contract is not void by the act of 1821, *ch.* 222. This act does not prohibit the business of vending lottery tickets; nor does it forbid the creation of an agency for that purpose. It is just as lawful to vend lottery tickets in authorised lotteries, by agent, as it is to vend merchandize, by agent. In both cases a license is necessary; not to legitimate the pursuit, but to qualify the vendor. How does the contract contravene the provisions of the act? The creation of an agency with a view to the sale of tickets, is not *ipso facto*, opening an office for that purpose, within the meaning of the act. It was a preparatory step. No one can be said to sell by agent, until he has constituted one. It is not shewn affirmatively, that a license was obtained; but *non constat*, that one was not procured. *O'Neale* was to bear the expenses of the agency; and, if necessary, it ought to be presumed, that a license was obtained. But

this is immaterial. A contract cannot be considered *in fraudem legis*, unless the parties had in view, at the time of its formation, a violation of the law. It is not good or bad by matter subsequent. 1 *Com. on Cont.* 31. *Bull, N. P.* 146. There is nothing upon the face of either contract shewing it to be of this character; nor is there any thing in the record, *dehors* the contracts, from which it might be inferred that a violation of this act was within their scope and object. Fraud is never presumed, much less a criminal intent. 2. But if there was any foundation for this objection, these defendants could not make it successfully. Where an agent has received money for his principal, he cannot set up in excuse of his responsibility, the supposed illegality of the dealings of which such money is the fruit. 1 *Bos. and Pull.* 296. 2 *Stark. Ev.* 120. These defendants are answerable upon their contract, precisely to the same extent that O'Neale himself would be accountable.

Palmer, for the appellant, contended, that the question really was, whether a party can vend lottery tickets without a license, and recover the proceeds of such sale; and not whether the contract is void, by virtue of the act of assembly referred to. If the parties are *participes criminis* in a void contract, neither can sue upon it. Though the rule may be, that money received by an agent, under a void contract, may be recovered from him by his principal, it can only apply to the agent, and *Smith*, the surety, does not fall within its operations. The suit was brought on the written contract, and the right to recover does not rest upon any supposed, implied agreement, growing out of the receipt of money by the agent, for the use of the principal. Contracts in violation of the common, or statute law, are void, and cannot form the foundation of an action. In this case, the obtension of a license was a condition *precedent* to the right to sell, and the selling without, is prohibited. *Aubert vs. Maze*, 2 *Bos. and Pul.* 374, 375. *Collins vs. Blantern*, 2 *Wilson*, 351. *Bensley vs. Bignold*, 7 *Serg. and*

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Low, 121. Where a contract is prohibited by statute, under a penalty, it is void, though not in terms declared to be so. 2 *Carth.* 252. 1 *Com.* 38. 1 *Bos. and Pul.* 264. *Coleman vs. Wathen*, 5 *Term*, 245. *Steers vs. Lashley*, 6 *Ib.* 61. *King vs. Handy*, *Ib.* 286. *Buck vs. Buck*, 1 *Camp.* 547.

Wm. Schley, in reply, insisted that this case differed from those cited on the other side. They respect the doing of some prohibited act, or some forbidden pursuit; and for which no *license* could be had. No license could be had which would *qualify* a person to commit *murder*, or to engage in *smuggling*, or to sell impure or *unwholesome liquors*, or to utter counterfeit *coin*, or to do any thing else, which is *malum in se*, or even *malum prohibitum*. He cited *Johnson vs. Hudson*, 11 *East*, 180, as illustrating the distinction.

DORSEY, J., delivered the opinion of the court.

The only question which this court are called on to determine, is, did the county court err in granting the defendants' prayer in the first bill of exceptions? and to our minds, it is obvious that they did. The agreements between *O'Neale* and *Yates* and *McIntyre*, are simply an engagement on the part of the former, to sell lottery tickets, as the agent of the latter. The act of 1821, *ch.* 232, does not forbid this; nor were any of its provisions designed to prevent the mere sale of lottery tickets, or to impose upon the seller the necessity of obtaining a license therefor. The only prohibition therein contained, is to the opening, setting up, exercising or keeping, any office or other place for selling tickets, or registering the numbers, or by writing, printing, or otherwise to publish the setting up, opening or using any such office or offices, or other place, without having first obtained a license for that purpose. There is nothing in the agreements, upon any principle of construction applicable to penal statutes, which could warrant a jury, much less the court, in inferring that *O'Neale* had en-

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gaged to open an office, &c. of the character described by this act of assembly; and the testimony is equally silent as to his obligations or acts under those agreements. But even suppose that these contracts bound *O'Neale* to keep an office, &c., is it a fair legal presumption to be drawn by the court, that *Yates* and *McIntyre* intended a violation of the law, and the keeping of such office without license? There is nothing in the nature or terms of the agreements themselves, or in the testimony contained in the bill of exceptions, which could justify such a conclusion. Dissenting therefore from the opinion delivered by the county court in the *first* bill of exceptions, we reverse their judgment.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

GAITHER and WARFIELD vs. WELCH's Estate.—Dec. 1831.

Absolute judgments at law obtained by a creditor of a deceased against his executor or administrator, amount to an admission of assets, and cannot be resisted on the ground of a deficiency of assets; but as between a creditor and the heir at law, in a proceeding to subject the real estate to the payment of his debt, such a judgment is not conclusive, but the creditor may show a deficiency of assets.

An administrator, who has confessed judgment, and thus admitted assets, being a creditor himself, may, as against the heirs of his intestate, for the purpose of subjecting the real estate to his claim, show that in fact the assets are not sufficient to pay all the creditors.

A judgment against an executor or administrator, does not furnish any evidence of the original debt, against the heir at law, in a proceeding to sell the real estate for the payment of debts, on the ground of a deficiency of assets.

Where the proceeds of a deceased's real estate are in the Court of Chancery, and a creditor wishes to subject that fund to the payment of his debt, upon the ground of a deficiency of assets, he is not called upon, in the first instance, to exhibit full proof of his claim. That may be done under the order *nisi* on the heirs at law.

APPEAL from the Court of Chancery.

On the 6th of November, 1829, the appellants, *William Gaither* and *Joshua Warfield*, filed their petition in Chancery, stating among other things, that previously thereto, to

wit, in July, 1826, a decree had passed for the sale of the real estate of *Nicholas Welch*, deceased, for the payment of a debt due from him to one *George Ellicott*. That a sale was accordingly made, reported to, and ratified by the Chancellor, and such other proceedings were had, that the auditor of the court stated an account, whereby the balance of the proceeds of said real estate, after satisfying the complainant's claim, was distributed among the heirs at law of said deceased—which account was duly ratified and confirmed by the Chancellor. That said *Welch*, at the time of his death, was indebted to the petitioner, *Gaither*, in a large sum of money, for which, after his death, he recovered judgments against the other petitioner, *Warfield*, and *Rachel Welch*, his administrators, as will appear by short copies thereof, exhibited by the petitioners in a former petition filed in the same cause, on the 25th of August last. And they also say, that judgments for the same claims were recovered against the petitioner, *Warfield*, as security for the said *Welch*. They charge—that although the judgments recovered as aforesaid against the administrators of the said *Welch*, appear to be *absolute* judgments, yet in fact the personal estate of the deceased, in the hands of his administrators, at the time of their rendition, was, and is insufficient to pay his debts, as will appear by certain exhibits filed with the former petition. The petitioner, *Warfield*, alleges, that said judgments were rendered improvidently, and in ignorance of their legal effect, and that he supposed they would only bind a fair proportion of the assets in his hands, under which impression he has accordingly, regularly, and equally distributed the assets amongst the creditors. He also alleges, that he is individually a large creditor of the deceased; and they *pray*, that the surplus of the aforesaid real estate, distributed as above mentioned, among the heirs at law of the deceased, may be applied to the payment of their claims, and all other unsatisfied claims against said estate, which may be properly proved, in equal proportions.

The judgments in favor of *Gaither*, against the administrators of *Welch*, and *Warfield* as his security, exhibited with the first petition, amount to a sum considerably exceeding the balance in the hands of the administrators, as appears by copies of their accounts settled with the Orphans Court, likewise exhibited with the original petition. The claims due *Warfield*, filed with the present petition, are less than that balance.

BLAND, Chancellor, on the 9th November, 1829, passed the following order :

The petition of *William Gaither* and *Joshua Warfield*, for themselves, and in behalf of other creditors of *Nicholas Welch*, deceased, filed in this cause on the 6th inst. having been submitted without notes or argument, the proceedings were read and considered. The petitioners, *Gaither* and *Warfield*, presented their claims by a petition filed on the 25th August last, which was disposed of by the order of the 26th of the same month, and feeling satisfied with the correctness of that order, it will be only necessary now to say, why I deem the new matter with which the claim is connected in this petition, to be altogether unavailable. The petitioner, *Warfield*, states that the judgments were rendered improvidently, and from ignorance on his part, of their legal effect and operation. If ignorance of law to this extent, were to be considered as a sufficient foundation for a court of equity to interpose, there are few judgments of a court of common law, which a Court of Chancery might not be called upon to revise and reform. But this court, can in no case, revise or reform a judgment of a court of common law in any respect whatever. And there are no such special circumstances of fraud, surprise or mistake, set forth in this petition, as can give this court jurisdiction to grant relief against those, who as heirs, creditors, or parties, may have a right to avail themselves of the effect and operation of the absolute judgments obtained against the petitioner, *Warfield*, as the administrator of the late *Nicholas Welch* ;

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and therefore, upon this ground, and for the reasons given in the order of the 26th August last, the claim must be again rejected.

But the petitioner, *Warfield*, states, that he is himself a creditor of his intestate. If so, it is perfectly well settled, that he might have at once retained and applied, of the assets which came to his hands, so much as was sufficient to satisfy his own claim; and having this well known legal right, it must be presumed, that he did so retain to that amount; because the absolute judgment rendered against him, was a tacit and conclusive admission, that he had assets sufficient to satisfy that, as well as his own claim; which could only be satisfied, by retainer in whole, or in due proportion with those of others, for which suits might be brought. And since he made no defence on the ground of an insufficiency of assets to satisfy his own claim, as well as that for which the suits were brought, these absolute judgments must be considered as alike conclusive evidence of a sufficiency of assets to satisfy both of them.—*Ordered* that the petition be dismissed with costs.

From this order the petitioner appealed to this court.

The cause was argued before BUCHANAN, Ch. J., ARCHER, and DORSEY, J.

Alexander, for the appellants, contended,

1. That the matters stated in the petition, if proved, would entitle the petitioners to the relief prayed against the payments recovered by *Gaither* against the administrators of *Welch*. 2 *Vernon*, 146. 2. That the petitioner, *Warfield*, was entiled to relief, in respect of his particular claim; the judgments above mentioned not concluding the said petitioner as to the sufficiency of personal assets, to satisfy his own claim.

No counsel appeared for the appellee.

BUCHANAN, Ch. J., delivered the opinion of the court.

The petition of the appellants appears to have been dismissed by the Chancellor, on the ground that the judgments

at law obtained by *William Gaither*, against the administrator of *Nicholas Welch*, were conclusive evidence of a sufficiency of personal assets in the hands of the administrator, to satisfy both their claims; and therefore precluded their proceeding against the real estate of the deceased, which could not be subjected to the payment of their claims, except upon an insufficiency of personal assets, which, by reason of those judgments, they were not permitted to show. As between *Gaither* and the administrator, the judgments being absolute, do certainly amount to an admission of assets, and the enforcement of them could not be resisted on the ground of a deficiency of assets. But as between a creditor and the heirs at law, in a proceeding to subject the real estate to the payment of his debt, a judgment, though absolute, against an executor or administrator of the ancestor, does not, we think, so stand in his way, but that the creditor may be let in, to show a deficiency of personal assets: and if in this case, *Gaither* had shewn himself to be a creditor, he would, on proof of a deficiency of personal assets, have been entitled to come in among other creditors, for a just proportion of the surplus proceeds of the real estate of *Nicholas Welch*, remaining after satisfying the lien for which the land had been sold, under a former decree of the Chancellor. The judgments alone against the administrator of *Nicholas Welch*, exhibited in the petition, would not, it is true, have furnished any such evidences of debt, as against the heirs at law, as to entitle him to payment out of the surplus proceeds of the real estate, even if he had been permitted to prove a deficiency of assets: and at the time of the rejection of the petition, he had offered no other evidence of his claim. But the fund proceeded against, being already in court, under a sale before made, it was not indispensably necessary that full proof of his claim should have been exhibited with the petition; but if the petition had not been dismissed on another ground, that proof might have come in, in the further progress of the proceedings, under an order *nisi* on the heirs at law, on the principle of the

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rule that appears to have been adopted by the Chancellor, in the case of *Fenwick and Bird vs. Loughlin and Hawkins*, in the Court of Chancery, and which we think a convenient rule. With respect to *Joshua Warfield*, the other petitioner, there is no objection to the character of the evidence exhibited with the petition, in support of his claim. But he is himself the administrator of *Nicholas Welch*, and by his own showing, by his several accounts as settled in the Orphans Court, there appears to be in his hands, assets to a much larger amount than sufficient to satisfy his debt; and if there are no other subsisting, unsatisfied claims against the estate, or not to an amount exceeding, together with his, the amount of the personal assets remaining in his hands, there is no pretence for his going against the real estate. But if there is in fact, a deficiency of personal assets, to meet the subsisting claims against the estate, notwithstanding the judgments obtained by *Gaither*, the other petitioner, are conclusive against him, as between *Gaither* and himself; yet we think they have not the effect to preclude him from shewing such deficiency, in order to let in his claim against the proceeds of the real estate. It is our opinion, therefore, that the petition ought not to have been dismissed; but that the petitioners should have been permitted to show a deficiency of personal assets, by the admissions of the heirs at law, or as they could, if such was the fact, and an opportunity offered them of establishing their respective claims.

DECREE REVERSED.

CITY BANK OF BALTIMORE, *et al.* vs. JAMES SMITH.—December, 1831.

S gave his note, payable 50 days after the drawing of a lottery should be completed, "in cash, or prize tickets in said lottery," and secured the same by a mortgage. The mortgagee, two years after the drawing, assigned the mortgage. The tickets in the lottery certified that the holder thereof would "be entitled to such prize as may be drawn to its number, if demanded within 12 months after the completion of the drawing, subject to a deduction of 15 per cent. payable 60 days after conclusion." Upon a bill filed some years after the assignment, to sell the mortgaged premises for payment of a balance due upon the note, IT WAS HELD, that prize tickets which had not been presented to the managers of the lottery for payment, within the 12 months, could not be set off against the complainant's claim. The prize tickets stipulated to be received in payment of the note, were intended to be available tickets, upon which the holders would be entitled to demand and receive, the prizes drawn to their respective numbers. They were those on which the prizes had been demanded within 12 months from the completion of the drawing, or on which the holder was entitled to demand the prizes, 12 months not having elapsed from the time of the drawing.

Equity will relieve against penalties and forfeitures, where the matter lies in compensation, whether the condition on which they depend, be precedent or subsequent. But notwithstanding it will in many cases interpose to prevent the divesting an estate, it will not relieve against the non-performance of a condition precedent to the vesting of an estate, by giving an estate that never vested, and that by reason of the non-performance of a condition precedent, will not vest in law.

APPEAL from the Court of Chancery.

The present bill was filed by the appellants, *the President and Directors of the City Bank of Baltimore, James Sterrett* and others, against the appellee, on the 16th day of October, 1827: it stated that *James Sterrett*, with one *Eli Simkins*, and *John P. Usher*, parties complainants, carrying on business under the firm of *Simkins and Usher*, and *Govert Haskins*, contracted with the managers of the *Washington Monument Lottery, 3d class*, for the purchase of the scheme: that the appellees, *James Smith* and *W. H. Clendenin*, being indebted to the said *James Sterrett*, as the treasurer of the contractors, in the sum of \$13.365, upon a promissory note, dated July 26th, 1817, given for tickets purchased by

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Smith, in said lottery, and payable fifty days after the completion of the drawing thereof, conveyed to *Sterrett* by way of mortgage, to secure the payment of the note, a certain house and lot in the city of *Baltimore*, by deed, bearing date the 28th of July, in the year aforesaid, with a provision, that the same should be void, if *Smith* should pay to *Sterrett* the sum of money in the note expressed, according to the terms thereof, either in cash, or prize tickets in said lottery, as by a copy of the deed exhibited with the bill, will appear. The bill then states, that the drawing of the lottery was completed on the 12th of December, 1817, and that *Smith* made various payments, in cash, or prize tickets, on account of the note, and that on the 18th of April, 1820, there remained a balance due thereon, for principal and interest, of about \$3000: that *Sterrett*, by deed dated on the 18th of April, 1820, assigned the mortgage for a valuable consideration, to the *City Bank of Baltimore*; but that *Smith*, the mortgagor, refused to pay the same, or any part of the money due thereon, to the said *City Bank*. *Prayer*, that the mortgaged property be sold to pay the debt, and for general relief.

The *answer* of *Smith* admitted the execution of the note and mortgage, as stated in the bill, but denied that the debt therein mentioned was due to *Sterrett* in his own right, but as trustee for the persons who contracted for the purchase of the scheme of the lottery mentioned in the bill, and charged that defendant purchased of the tickets of said lottery, to the amount of the note referred to, and that the mortgage was given to secure the same, and for no other purpose: that he has made many payments, and is also entitled to considerable credits for lottery prizes, which have not yet been allowed him, and that when every thing to which he is entitled shall be credited, nothing will be due upon the aforesaid note: that *Eli Simkins*, one of the contractors, is largely indebted to defendant, and he is informed, and believes that the contractors made heavy profits by the purchase and sale of said lottery, and he insists that he has a right to set off the pro-

portion of the same, to which said *Simkins* may be entitled, against the amount due on his said note: that *Sterrett*, the treasurer of the contractors, has never settled with them for their proportion of the profits of the lottery, but that he has converted the same to his own use, and that the assignment by him to the Bank of this defendant's note and mortgage, was without their knowledge or approbation, and wholly unauthorised and void.

The note referred to in the bill and answer, is in these words: "*Baltimore*, 26th July, 1817. (\$13.365.) Fifty days after the drawing of the *Washington Monument Lottery*, third class, is completed, we, the subscribers, jointly and severally, promise to pay to *James Sterrett*, or order, in cash or prize tickets in said lottery, the sum of thirteen thousand three hundred and sixty-five dollars, for value received."

The assignment by *Sterrett* to the Bank, dated April 18th, 1820, recites, among other things, "that, whereas there now remains due on said mortgage, the sum of \$3000, or thereabouts, inclusive of interest; and whereas, in part satisfaction and discharge of a debt due from the said *Sterrett* to the said Bank, the said *Sterrett* hath proposed and agreed to execute these presents. Now this indenture "witnesseth, that for and in consideration of the above recited premises, and of the sum of five dollars, lawful money paid, the said *Sterrett*, &c."

A *commission* issued, under which depositions were taken and returned.

John S. Gittings, examined on the part of complainants, proved, that there were sundry endorsements on the note of *Smith* and *Clendenin*, all of which, down to the 6th of April, were in the hand writing of *Sterrett*, when a balance of \$3254 80, was struck; that the subsequent endorsements down to the balance of \$2847 60, are in deponent's hand writing, he having been a clerk in the *City Bank* for three years, and that the final balance of \$2747 60 is in the hand writing of said *Sterrett*. Defendant frequently acknowledged

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to deponent to owe the balance appearing due at different periods, and when called upon, promised payment.

Govert Haskins, on the part of the defendant, proved, that he was interested in the purchase of the lottery referred to in the bill and answer, and that from information received from *Sterrett*, he believes it resulted profitably, though he has not received his proportion, nor settled with *Sterrett* for the same, notwithstanding frequent applications to him for that purpose. *Sterrett* was a joint contractor and treasurer for the purchasers; the witness also stated, that the note, which the mortgage from defendant to *Sterrett* was given to secure, was given for a number of tickets which defendant purchased from *Sterrett*, as the treasurer of the contractors, and that he, the defendant, never authorized *Sterrett* to assign said note and mortgage.

It was proved on the part of defendant, that *Sterrett*, *Simkins* and *Haskins*, purchased the scheme of the lottery from the managers, and that they paid the purchase money; that they gave bond to the managers for the payment of the prizes, which the witness (who was treasurer for the managers) supposes they paid, as the managers had been called on for none.

John B. Morris, on the part of complainants, proved, that in the latter part of the year 1820, the defendant called at the *City Bank of Baltimore*, and was there for some time in conversation with deponent; that defendant at that time observed he would give a note, provided the Bank would cancel the mortgage; and that in a subsequent conversation, defendant received the proposition to give a note, provided the mortgage was cancelled, which deponent said could be of no use, as the Bank after obtaining judgment on the note, could give indulgence; that it was not until the latter part of the year 1820, that the Bank were apprised that pretensions to an interest in said note, were set up by any one, and that the note had been assigned to the Bank twelve months prior to his conversation with defendant. It was further proved by a witness who was present at the examination

of *John B. Morris*, that at that time, defendant remarked he had offered *Morris* an endorsed note, for the note which the Bank held secured by the mortgage; that *Morris* replied, that he might have done so, but it had escaped his recollection. It was proved that the drawing was completed on the 12th December, 1817. The following is a copy of one of the prize tickets, produced by *Smith* as a set off:

“*Washington Monument Lottery, third class.* The holder of this ticket will be entitled to such prize as may be drawn to its number, if demanded within twelve months after completion of the drawing, subject to a deduction of fifteen per cent. payable fifty days after conclusion. *Baltimore*, June, 1816. *F. Lucas, Jr.* Mr. No. 22,431.”

In conformity with an order of the Chancellor, the auditor stated an account between the parties.

No. 1, stated agreeably to the complainants' instructions, showed a balance due them for principal and interest on the 12th June, 1818, of \$2444 69. In this account the defendant is charged with the amount of his note, and credited for payments in cash and prize tickets, claimed within twelve months after the completion of the drawing, as limited on the face of them, and for a pair of oxen, &c.

No. 2. An account stated in conformity with the defendant's views, credits him for all the prizes, as well for those demanded since, as those demanded before the expiration of twelve months after the drawing of the lottery, and shows that he had over paid the principal of the note by \$14 80, though a small balance of interest remained due. Many of the prizes credited in account No. 1, as having been demanded within the twelve months, were for small sums, whilst some of those which were rejected on that account, because not presented in time, but credited in account No. 2, are for \$100, and some \$500; they were exhibited to the auditor on the 30th of July and 20th October, 1825. To the allowance of these prizes the complainants excepted.

Bland, Chancellor, at September term, 1830, confirmed account No. 2, and decreed that defendant pay to the com-

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plainants, or bring into court, to be paid them, the amount therein stated to be due; and that each of the parties pay their, or his respective costs.

From this decree the complainants appealed to the Court of Appeals.

The cause came on to be argued before BUCHANAN, Ch. J., ARCHER, and DORSEY, J.

John I. Donaldson, for the appellant, contended,

1. The prize tickets, where the prizes were not demanded within the twelve months, could not be set off against the original parties to the contract: he insisted that it was the policy of the lottery system, to limit a time for the presentation of prize tickets, that the whole scheme might be brought to a close within an early period; and it was designed that the prizes should be forfeited, if not demanded within the prescribed time. *Barruso vs. Madan*, 2 Johns. 145. The presentation within the time, was a condition precedent to a title to the prize, against which equity will not relieve. 1 *Chitty's Eq. Dig.* 224. 2 *Eq. Cases Abrid.* 209. *Popham vs. Bampffield*, 2 Vernon 83. 2. But if they could be set off against the original parties, they cannot be against the assignees after the admission to the agents of the *City Bank* that the defendant owed the money.—*Chambers vs. Goldwin*, 9 Ves. 270. *Chapman vs. Hart*, 1 Ves. Sr. 272. *Kemp vs. McPherson*, 7 Harr. and Johns. 320.

Johnson and Mayer, for the appellee.

1. The attempt of the Bank to place themselves on higher ground than their assignor, *Sterrett*, cannot succeed in the present state of the pleadings. The bill does not aver that the Bank was ignorant of the nature of the transaction; on the contrary, it admits a knowledge of it, for it appears manifestly, that the Bank knew that *Sterrett* held the mortgage, as the treasurer and agent of the contractors. When a second incumbrancer, either as plaintiff or defendant, seeks to be relieved from a prior incumbrance, he must allege the

ground for such relief in his bill or answer, as the case may be. *Brinckerhoff vs. Lansing*, 4 *Johns. Ch. R.* 65, 71. The mortgagee, *Sterrett*, does not stand in a better condition than his contractors, and they certainly could not deprive *Smith* of this defence. But the mortgage upon its face, contains constructive notice of the nature of the transaction. The Bank being a purchaser of the note and mortgage, as a security for its payment, were bound to take notice of its character. *Sugden Vend. 5 London Ed.* 649 to 651. The mortgage refers to the note, as having been given to *Sterrett*, as the treasurer of the contractors. This, at any rate, was sufficient to put the parties on the inquiry, which amounts to constructive notice. It was not the duty of *Smith* to go to the Bank, but the Bank was bound, if in doubt as to the character of the transaction, to go to him to make the necessary inquiries, and they were guilty of *crassa negligentia* in not doing so. 2. Considering then, that the Bank stands in the shoes of *Sterrett*, the question is, whether *Smith* has not a right to avail himself of the prize tickets, by way of payment or set off? Both the note and mortgage show a contract to pay in cash or prize tickets, and there is nothing in either limiting a time within which the tickets shall be presented. The question is not, what are the rights of the holders of prize tickets, as against the managers of the lottery, though even as against them, the holders would be entitled to be paid as creditors of the lottery fund, if it had not been distributed; the question here is, between the holders of tickets, not presented within the time limited on their face, and the purchasers of the scheme, who have given bond to the managers, securing to them a certain sum of money to accomplish the object of the lottery, which sum has been paid. The object of the lottery then, has been effected, and there can be no reason founded in the supposed policy of the lottery system, why the purchasers of the scheme should not be bound to pay the prizes; if even the avails of the lottery had been divided among the contractors, a question might be raised, as to the rights of the defendant

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to be allowed for the tickets in question, but the evidence shows that this has not been done, but that the whole amount is still in the hands of *Sterrett*, the treasurer. *Smith* is not a volunteer, but a purchaser for value, and the moment a ticket held by him came up a prize, in that prize he had a vested interest. The parties responsible for the prizes, are the very persons to whom *Smith* paid the money for the tickets, and equity, therefore, requires that they should pay. The right to the prizes was a vested and valuable right, subject to be defeated, by lapse of time, at law; it was liable to attachment, bequest, or transfer—it was not suspended for twelve months, but demandable at any time within twelve months. The rule *now* is, that a court of equity will relieve against a condition unperformed, if the case be such, that compensation can be made, or the parties placed in the same situation, as if the condition had been performed. *Moss vs. Matthews*, 3 Ves. Jr. 279. *Vernon vs. Stephens*, 2 P. Wm. 66. *Oddy vs. Torlas*, 2 Vernon, 362. *Cattell vs. Money*, 3 Bro. Ch. C. 256. *Taylor vs. Popham*, 1 Ib. 168. 1 Bac. Abrid. 642. 1 Madd. Ch. P. 41, 42. On the 18th December, 1818, when the twelve months from the completion of the drawing had expired, the money to pay the prizes remained in the hands of *Sterrett*, the treasurer, and it was therefore the same to him, whether the tickets were presented before or afterwards. Justice requires that the prizes should be paid, and when *Sterrett*, or those claiming through him, ask a court of equity to give them the benefit of the mortgage, they will be compelled to do equity by paying the prizes. The delay in presenting the tickets has not changed *Sterrett's* situation for the worse. 3. It does not appear that the Bank advanced money to *Sterrett*, as a consideration for the assignment of the mortgage; it was taken to secure a pre-existing debt due from him, and there is no evidence that the assignees have lost any advantage by the alleged conduct, and promises of *Smith* to pay the money; this distinguishes it from the case of *Kemp vs. McPherson*, 7 Harr. and Johns. 337.

Taney, (Att'y Gen'l U. S.) in reply,

1. The set-off relied on by the defendant, could not be used against the managers of the lottery ; it consists of prize tickets issued by those managers, and the contract of the holders was with them. The tickets upon the face are payable sixty days after the drawing, and are required to be presented within twelve months from its completion. The contractors purchased all the tickets from the managers for a valuable consideration. The defendant's note given for tickets, became due fifty days after the drawing, and consequently ten days before the prizes: the tickets now attempted to be set-off, were not presented until July, 1825, more than seven years after the time limited for their payment. There is no evidence to show when they came to the possession of the defendant, from whom he obtained them, nor is any excuse offered for the delay; the presumption, therefore, is, that he obtained them about the time he exhibited them. This fact is assumed, and then the question is, what equities arise to the defendant, upon supposed rights then acquired? if he asks for an equity derived from a prior possession, it is his duty to prove such possession. The first question, then, is, could these tickets be recovered of the managers? The contract by its terms was conditional. The tickets, the evidence of that contract, were valuable, upon two contingencies; 1st, that they should draw prizes; and 2d, that they should be presented within twelve months. The time of payment and the demand are in separate clauses of the contract; both contingencies are conditions precedent. The demand within the prescribed period, was inserted for the safety of the managers, and benefit of the scheme, because, if no demand was necessary, innumerable suits might be brought, swallowing up the whole profits of the lottery: the *demand* then, was not a mere formal condition, but of the essence of the contract. If a demand within the twelve months is not material, then the money for the prizes may be demanded, and recovered of the managers now; as the right to sue arises upon demand, limitations would be no bar.

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Equity cannot relieve against an unperformed condition precedent. 1 *Chitty's Dig.* 224. 2 *Eq. Cas. Abrid.* 229. The case referred to, on the other side, from 1 *Bac. Abr't.* 642, and 2 *Vernon*, 362, were conditions subsequent; and 1 *Madd. Ch. P.* 41, 42, shows that equity can only relieve in the case of a condition subsequent, when compensation can be made. Even in cases of forfeiture, if the forfeiture is complete, and the estate vested, equity cannot relieve. 1 *Chitt. Dig.* 453. If by reason of non-performance the estate has not vested, equity cannot vest; or if by reason of the non-performance of a conditional limitation, the estate has vested in another party, equity will not divest it out of the latter, and vest it in the former.

2. But suppose equity could relieve, in this case of an unperformed condition precedent, this is not a case fit for equitable interposition; the party at all events should be required to come in a reasonable time. A delay of some years is too long; public policy and convenience require that an earlier application should be made.

3. The situation of the contractors is not worse than that of the managers; their rights depend upon the stipulation in the note, and there is nothing in it to show that it was to be paid in other prize tickets than those for which the managers would be responsible. The circumstance of its becoming due ten days before the prizes were payable, shows that it was to create a fund for their payment. Such tickets only, were to be received in payment, as would be equivalent to *cash* in their settlement with the managers. It cannot be presumed that the contractors meant to assume a larger responsibility than the managers, in reference to the prizes; they were merely bound to indemnify those managers, by paying those prizes, and those only, for which they were answerable: but for the terms of the note, prize tickets could not be set-off at all, because the tickets were issued by, and from a contract with the managers, and not the contractors.

4. It is not material whether the Bank had or had not notice, that *Sterrett* was a trustee for the contractors, because they join

in the bill, and pray that the money may be paid the Bank. The material question upon this part of the case is, had the Bank notice that *Smith* held, and claimed to set-off the tickets, for which he now asks to be credited? If the assignees had no such notice at the time of the assignment, and *Smith* induced them to believe that the amount stated to be due would be paid, he is not entitled to the set-off. The evidence shows clearly that he did so, and offered to give his note for the amount.

BUCHANAN, Ch. J., delivered the opinion of the court.

The note given by the defendant to *James Sterrett*, to secure the payment of which, the mortgage to *Sterrett* was executed, was for the price of a number of tickets in the *Washington Monument Lottery, third class*, (the scheme of which had been purchased from the managers by *Sterrett* and others,) and payable by its tenor, in cash or prize tickets in that lottery, fifty days after the drawing should be completed. The drawing of the lottery was completed on the 12th of December, 1817, and the bill being for the fore-closure of the mortgage, (which, on the 18th of April, 1820, was transferred to the complainants, the *President, Directors, and Company of the City Bank of Baltimore*, in consideration of a debt due from him to them, and a further pecuniary consideration,) and a sale of the mortgaged premises, to satisfy the balance claimed to be due on the note, various payments having been before made by the defendant in cash or prize tickets, the question is, whether the defendant is at this time, entitled to a credit for a number of prize tickets, which were not demanded within twelve months after the completion of the drawing of the lottery?

It can scarcely be doubted, that the prize tickets stipulated to be received in payment of the note, were intended to be available tickets; not such as had lost their validity, but tickets, on which the holder would be entitled to demand and receive the prizes drawn to their respective numbers. None other would be a prize ticket within the

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meaning of the contract ; and as it relates to prize tickets in the 3d class of the *Washington Monument Lottery*, it is proper to inquire what was a prize ticket in that lottery, on which the holder was entitled to receive the prize drawn to its number. That inquiry is gratified by an inspection of the tickets themselves, by each of which, the holder is advised, in the language of the ticket, that he “will be entitled to such prize as may be drawn to its number, if demanded within twelve months after the completion of the drawing.” It was not a concealed or hidden purpose, or of doubtful import, but a palpable notice to all the world, by which every purchaser was informed of the terms, on which alone, he could become a successful adventurer. It informed him, that a prize being drawn to the number of his ticket, was not alone sufficient ; but that, to entitle himself to such prize, it was necessary he should demand it within twelve months after the completion of the drawing. A prize ticket, therefore, in the third class of the *Washington Monument Lottery*, the holder of which was entitled to the prize drawn to its number, was one, on which the prize had been demanded within twelve months from the completion of the drawing : or one, the holder of which was entitled to demand the prize, twelve months not having elapsed from the time of the drawing. It was a part of the scheme of the lottery, that the prizes not demanded within twelve months should become a part of the fund, which it was the object of the lottery to raise ; and the probability that a portion of them would not be demanded, entered into the calculation of the chances. To which scheme, and to the condition plainly expressed upon the face of such ticket, every purchaser gave his assent, by the act of becoming a purchaser.

The time and circumstances attending the claim to a credit for these tickets, are not such as to invite the favorable consideration of the court. The note was given on the 26th of July, 1817, and the mortgage we have seen, was transferred to the *President, Directors, and Company of the City Bank of Baltimore*, on the 18th of April, 1820,

more than two years afterwards. Between the date of the note and the assignment of the mortgage, various payments were made on the note by the defendant, in cash or prize tickets, leaving a large balance, which, it is proved by *John S. Gittings*, then acting as the agent of *Sterrett*, he frequently admitted to him was due, and promised to pay. Here the inquiry forces itself upon us, why, if he then owned, or was in possession of the prize tickets, for which he now claims a credit, and thought himself to be entitled to do so, did he not apply them to the payment of the note, or claim a credit for them, when he was making payment in other prize tickets? They amounted to a large sum, (several thousand dollars,) too large a sum it would seem to have been overlooked or forgotten. And why, with such ready means of payment, did he acknowledge to the agent of *Sterrett*, that he owed the balance appearing upon the note to be due, and frequently promise to pay it? In the latter end of the year 1820, after the assignment of the mortgage, and when he had a knowledge of that assignment, he at different times, in conversations with *John B. Morris*, who was acting for the Bank, proposed to give a note for the balance due on the note in question, if the Bank would cancel the mortgage. And it is proved by another witness that he heard him, several times, say to *John B. Morris*, that he had also offered an endorser. Why did he not then, when negotiating with *Morris*, for an adjustment of the balance claimed to be due upon the note, instead of offering a new note for that balance with an endorser, offer in payment the prize tickets for which he is now claiming a credit? If he then possessed or owned them, and was entitled to the credit claimed, it is difficult to conceive that he could have forgotten them, or why he did not claim to be allowed for them, when pressed for a settlement of the note; they were prizes, many of them of 20, others of 50, and some of \$500 each. It was not that he was inattentive to his interest, because he did claim other credits; and if he had the tickets, and supposed he was entitled to it, he ought to have claimed

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this. It was a matter peculiarly within his own knowledge, for the Bank cannot be presumed to have known that he had such tickets in his possession, and it was his duty to have disclosed it, if he intended ever to set them up against the claim upon the note and mortgage, or supposed he had a right to do so; and not by concealment to deceive the Bank, at the very moment when he was pressed for payment of the balance claimed upon the note. The original bill for a fore-closure of the mortgage, which was filed in May, 1820, was dismissed for the want of proper parties, on the 21st of December, 1826; but by an agreement appearing in the record, all the proceedings and evidence in that case are to be used in this. In his answer to that bill, the defendant sets up no pretence that the note was satisfied, or that he was entitled to any credit on account of any tickets in his possession. And although testimony was taken under the commission in relation to a few prize tickets which were alleged to have been lost, amounting to something more than \$78, and for which a credit had been claimed, and also in relation to a pair of oxen, both of which credits are allowed by the auditor in his statement; yet no testimony whatever, was taken, nor claim set up, in relation to those prize tickets, of so much more importance, until July, 1825, when, for the first time, they were exhibited before the auditor, and the amount of the prizes insisted on as a credit against the note, more than seven years after the drawing of the lottery, and more than five years after the filing of the bill. During the whole of this time, the defendant was pressed for payment of the balance claimed to be due on the note, and for the greater part of the time, proceedings in Chancery were going on to enforce the payment. From all which, the conclusion is irresistible, that the defendant was not in possession of, nor had any interest in the tickets in question, at any time, before the assignment of the mortgage to the Bank, nor until long after. And he comes into a Court of Chancery with a bad grace, insisting upon a credit for them now, to which, by his proposal to give a note with an endorser,

for the amount claimed to be due, if the Bank would cancel the mortgage, he virtually admitted he was not at that time entitled, and without showing how, or when, or from whom, he obtained the tickets for which the credit is claimed. By the stipulation in the note of the defendant, that it should be payable in cash or prize tickets, such tickets were meant as would, at the time of payment, entitle the holder to their prizes, which, according to the terms of the condition expressed upon the face of each of them, is not the character of the tickets, for which, the defendant now claims a credit against his note, none of them having been demanded within twelve months after the drawing of the lottery; and consequently not being such, as entitle the holder to the prizes drawn to their numbers. And adhering to the express terms of the lottery, if this was a proceeding by *James Sterrett* and the other purchasers of the scheme, to enforce the payment of the note, the defendant would not be entitled to the credit he claims; the omission by the holders of tickets to demand the prizes in time to entitle themselves to them, being one of the sources of profit, which the purchasers of the scheme had a right, and probably did look to and rely upon, as a part of the scheme of the lottery. In that respect, occupying the position of the original managers, for they purchased the scheme with all its advantages. It was only by the terms of the note, that prize tickets were made receivable at all in payment; for without that stipulation, the defendant would have had no right to pay off his note in prize tickets, and to settle his claim for prizes in that way, but must have looked to the original managers for payment of his prizes; and to compel the receipt now, of such as are not available, and do not entitle the holder to demand and receive the prizes from the managers, would not be to oblige the parties to fulfil their engagement, but to coerce them to do what they never contracted to do, what, by the terms and spirit of their engagement, they were under no obligation to do; for their engagement was not to receive in payment, tickets that would not entitle the holder to the prizes

drawn to their respective numbers; and as to such tickets, it is, as if there was no stipulation to receive prize tickets in payment at all, and the note was payable in cash only. And if the defendant would not be entitled to a credit for those tickets, as against *Sterrett* and the other purchasers of the scheme, in proceedings by them to foreclose the mortgage, what pretence is there for such an allowance, as against the assignees of the mortgage, who took it more than two years after the drawing of the lottery had been completed; and when the balance claimed on the note was acknowledged by the defendant to be due, and no claim to a credit for those tickets had been set up, nor until five years afterwards, though the defendant was pressed for payment, to which he might have applied them at any time within twelve months after the drawing, if he was then in possession of them, of which there is no evidence, but every reason to believe that he did not obtain possession of them for many years after the title of the assignees had accrued. And though the note informed them that it was payable in prize tickets, yet they were also informed by the tickets themselves, that the defendant could not, according to the scheme of the lottery, be in possession of any tickets applicable to that purpose, when they received the assignment of the mortgage; the time having elapsed within which alone the holders of tickets were entitled to demand and receive the prizes drawn to their numbers. They took the assignment of the mortgage, therefore, not only, without notice of any subsisting claim to a credit for these tickets, but with the assurance, looking to the terms of the lottery as proclaimed on the face of each ticket, that there could be no such claim.

But it has been strongly urged, that the assignees of the mortgage took it subject to all the equity of the mortgagor as against the mortgagee; and that this being the case of a condition, equity will relieve against the effects of the non-performance of it, by giving to the defendant the benefit of the prizes, though not demanded according to the condition.

Equity will relieve against penalties and forfeitures, and where the matter lies in compensation, whether the condition be subsequent or precedent; as if it be for the payment of a certain sum of money at a certain day, and the payment at a subsequent day will be a compensation for the non-performance, the intent being to secure the payment of the money. But notwithstanding it will, in many cases, interpose to prevent the divesting an estate, it will not relieve against the non-performance of a condition precedent to the vesting of an estate, by giving an estate that never vested; it will not vest an estate, that by reason of the non-performance of a condition precedent will not vest in law. This is not a case of forfeiture; no right to the prizes for which the credit is claimed, was ever acquired, to be forfeited. Nor is it one in which the matter lies in compensation; for if the defendant is to be relieved against the non-performance of the condition, by being allowed a credit for the amount of the prizes drawn to the numbers of those tickets—what is to be the compensation to the assignees of the mortgage, who would thus lose the amount of the prizes so credited? It is not within the principle on which equity will relieve, where a compensation can be made, as where the condition is for the payment of a certain sum of money at a certain day, the breach of which condition may be compensated by payment at a subsequent day. But here the entire loss would rest upon the assignees of the mortgage, without any compensation; and it would be the same, if the proceeding was by the purchasers of the scheme, who by the allowance of the credit here claimed, would be deprived of the benefit of the prizes, without any compensation, to which, by the omission to demand them within twelve months after the completion of the drawing of the lottery, they become entitled, as a part of the profits of the scheme, and of their purchase. Neither is it the case of a condition subsequent; but a demand within twelve months after the completion of the drawing, was a condition precedent to the vesting of the right to the prizes, and without the per-

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formance of which, the right could not vest in law; and equity will not relieve by interposing to vest the right.

We therefore think, that the defendant is not entitled to the credit claimed; and that the decree ought to be reversed with costs; and a decree passed for a foreclosure, and sale of the mortgaged premises, to satisfy the amount due, with interest, according to account No. 1, as stated and reported by the auditor.

DECREE REVERSED.

JOHN B. STIMMEL vs. JOHN UNDERWOOD.—*Dec.* 1831.

The current of decision in modern times, both in *England* and the *United States*, has set against all objection to the admissibility of a witness, unless his interest be a legal interest. There is no other safe standard of exclusion than a legal interest.

It is no objection to the competency of a witness, that he had been heard to say some months before the trial, he felt himself bound to pay the plaintiff the amount of the controversy, if the plaintiff did not recover, the witness having been since released by the plaintiff.

A mistaken belief, or an honorary obligation, on the part of a witness, that he is bound, or ought to pay the plaintiff's claim, in case he should not recover in the action, does not render the witness incompetent.

Evidence of unsworn declarations of a witness is inadmissible to impeach his competency.

The undertaking of a security for costs upon the record may be stricken out, and a new and sufficient security, in the discretion of the court, substituted, to make the first security a witness for the plaintiff.

PER FREDERICK COUNTY COURT.

APPEAL from *Frederick* County Court.

This was an action of *Assumpsit*, commenced on the 1st August, 1826, by the appellee, against the appellant, on a promissory note payable at four months from the 25th of September, 1815, of which the appellant was the maker, endorsed by one *Philip Buzzard* to *J. R. Buzzard*, and by him to the plaintiff. The defendant pleaded *non-assumpsit* and limitations, to which there were issues.

1. At the trial the plaintiff produced the note with the endorsements thereon, and offered to prove the execution of the same and the endorsements, by *John R. Buzzard*, one of the endorsers. Upon an objection to his competency, on the ground of interest, the plaintiff produced a release, executed by him to the witness, dated on the 26th of October, 1827, and offered to prove by *L. P. W. Balch*, the subscribing witness thereto, that it was executed by the plaintiff, on the day of its date, and delivered to the witness on the 12th day of March, 1828, by the said *Balch*; but the defendant objected to the competency of *Balch* to testify in the cause, because of his being security for the costs in the action. The plaintiff then, against the consent of the defendant, moved to strike out the name of said *Balch*, as security for the costs, and to substitute other sufficient security in his place, which, by permission of the court was accordingly done, and the said *Balch* was then adjudged by the County Court to be a competent witness. The defendant excepted.

2. After the testimony offered in the first bill of exceptions, which is to be taken as a part of this, had been given, the defendant proved by a competent witness, that in the early part of November, 1827, he heard *John R. Buzzard* (the witness produced and sworn by the plaintiff,) say, that he had said, that he, the witness, felt himself bound to pay the plaintiff the amount of the claim in controversy, if the plaintiff did not recover the same in this action; and that *Buzzard* also said, he then felt himself bound to pay the same, provided the plaintiff did not recover it from the defendant. The plaintiff then proved by said *Balch*, that he had not given any notice to *Buzzard* of the execution of the release, until the 12th of March, 1828; that no person was present at the time of its execution but him (*Balch*) and the plaintiff, and that the release has ever since been in his (*Balch's*) possession. The defendant thereupon objected to the competency of *Buzzard* as a witness for the plaintiff; but the court overruled the

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objection, and permitted his testimony to go to the jury. The defendant excepted, and the verdict and judgment being against him he appealed to this court.

The cause was argued before STEPHEN, ARCHER, and DORSEY, J.

F. A. Schley, for the appellant, abandoned the first exception.

Upon the 2d exception he contended, that the release to *Buzzard* could have no influence upon the question to be decided. 2 *Stark. Ev.* 299, 300. *Dickinson vs. Prentice*, 4 *Esp. Cases*, 32. The only question is, whether the declarations of the witness, that he felt himself bound to pay the amount of the note, if the plaintiff failed to recover it from the drawer, disqualified him.

To show that an honorary obligation will disqualify, he cited—*Peak's Ev.* 165, (old ed.) *Innis vs. Miller*, 2 *Dallas*, 50. *Fotheringham vs. Greenwood*, 1 *Strange*, 129. *Trustees of Lan. vs. Willard*, 8 *Johns.* 428. *Trelawney vs. Thomas*, 1 *Hen. Blk.* 306. *Pederson vs. Stoffles*, 1 *Camp.* 145. *Richardson's Ex. vs. Hunt*, 2 *Mumf.* 148. *Skillingler vs. Belt*, 1 *Connt.* 147.

Palmer for the appellee.

An honorary obligation which cannot be enforced at law is not an objection to the competency of a witness; neither is it an objection to the competency of a witness, that he believes himself interested in the event of the suit, when in fact he is not so. Since the case of *Bent vs. Baker*, 3 *Term.* 27, it has been considered as settled law in *Westminster Hall*, that to render a witness incompetent, on the score of interest, he must have some legal, fixed, certain and immediate interest in the result of the cause, or in the record as an instrument of evidence. The common law recognises but one description of interest, that is, an inte-

rest in the event of the suit. An interest in the question merely, is not in legal estimation, *an interest*. It is a bias affecting his credit, but not his competency. A bias without a legal, fixed interest, will in no case render a witness incompetent; if it would, the rules of evidence would be rendered too uncertain for practice, and too limited for the investigation of truth. If a bias without interest would render a witness incompetent, heirs apparent would be rendered incompetent to give testimony for their ancestors. No one will doubt their competency; yet, it would be difficult to imagine a stronger case of bias. The only English cases relied upon to prove the converse of this position, are, *Fotheringham vs. Greenwood*, 1 *Strange*, 129. *Trelawney vs. Thomas*, 1 *Hen. Black.* 307. *Rudd's Case*, *Leach. C. C.* 154. It is difficult to perceive on what principle the case of *Fotheringham vs. Greenwood* could be supported. The other cases referred to are based upon that case. The law of evidence has been maturely considered, and has undergone material changes as regards the competency of witnesses, since the time the cases referred to were decided, and the rule now is, that nothing creates incompetency but actual interest in the cause in which the witness is to be sworn. In the case of *Pederson vs. Stoffles*, 1 *Camp.* 144, it is decided, that an honorary obligation which will be affected by the event of the cause, is not an objection to the competency of a witness. The principle of this case is approved of in 1 *Phillip. Ev.* 43. *Saund. P. and E.* 947. 2 *Starkie's Ev.* 4 pt. 747. *Union Bank vs. Knapp*, 3 *Pickering*, 108. In the case of *Smith vs. Downs*, 6 *Conn.* 365, the court, after full investigation, decided that an honorary obligation will not render a witness incompetent. The case of *Skillinger vs. Belt*, 1 *Conn.* 147, cited as settling this question in *Connecticut*, has been misconceived. That case was not decided upon a question of honorary obligation, but it was a question of actual obligation, arising from a secret understanding of the parties. The witness was rejected on the ground that the release in question was a *sham business* made

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for the occasion. It is decided in *Gilpin vs. Vincent*, 9 Johns. 219, that an honorary obligation goes to the credit of the witness only : the same principle is decided in the case of *Moore vs. Hitchcock*, 4 Wend. 292. The case of *McVeagh vs. Goods*, 1 Dall. 62, and the case in 2 Dall. 50, (*Innis vs. Miller*,) were decided upon the authority of *Fotheringham vs. Greenwood*, but they were overruled by the case of *Long vs. Bailie*, 4 Serg. and Raw. 222, in which it is decided that an honorary obligation will not render a witness incompetent, and also that it is no objection to the competency of a witness, that he believes himself interested in the event of the suit, when in truth he is not so. A witness must be interested in the event of the suit at the time of taking the oath, to render him incompetent. *Fernsler vs. Carlin*, 3 Serg. and Rawle. 130. *Henry vs. Morgan & Cox*, 2 Binney's, 497. A witness is competent, though another swore he heard him say some years before, that he would be a great loser if the plaintiff miscarried in the suit. *Pollock vs. Gillespie, et al.* 2 Yeates, 129. In the case before the court, the witness did not pretend that he considered himself interested at the time of taking the oath, but it was long before, and before the release was given and made by the witness. The release in this case was no *sham business* made for the occasion ; it was a *bona fide* transaction. The question under consideration has been decided in this State. The distinction between bias and interest is clearly recognised, and the question fully settled, that to render a witness incompetent to give evidence, he must have a legal, fixed interest, in the event of the suit, in which he is called to give testimony. *Peters vs. Beall*, 4 Harr. and McHen. 342. *Ringgold vs. Tyson*, 3 Har. and Johns. 178. If a witness become interested by his own act, to deprive the party calling him, of his testimony, he is, notwithstanding, a competent witness ; for the party has a right to his evidence, and cannot be deprived of it by the acts or opinions of the witness. *King vs. Fox*, 1 Strange, 652. Bull. N. P. 290. If the law was not as now contended for, an unwilling witness

might, and most probably would, deprive the party, in almost every instance, of the benefit of his testimony, by his own act, or by declaring or pretending that he was interested in the suit, or felt himself in honor bound to pay costs or some part of the judgment that might be recovered.

ARCHER, J., delivered the opinion of the court.

The question has been discussed, whether a witness's belief of his interest in a cause, when in truth he has no interest; or whether his being under an honorary obligation to pay, if the person for whom he testifies fails in the action, will render him incompetent. Upon this subject there has certainly been much diversity of opinion; but the current of decision in modern times, both in *England* and the *United States*, has set against all objection to the admissibility of a witness, unless his interest be a legal interest. Notwithstanding the determination in 1 *Strange*, 127, and the views expressed in 1 *Hen. Black*, 307, the universally received opinion in *England*, at this day, is against such objection, as will be perceived by a reference to 1 *Phillips' Ev.* 40; 2 *Stark. Ev.* 746, and 2 *Saund. Plea. and Ev.* 560. These books are not cited as of authority in themselves, but as indicating that the opinions of men of science, at this day, in that country, are in favor of the modern decisions. In this country too, although there is considerable diversity of views, in the different States upon these subjects, the opinion, that the witness is admissible, appears to be gaining ground. In *Kentucky*, *Massachusetts*, and *Virginia*, the witness is excluded; in *Vermont* he is admitted; 2 *Tyler*, 273; and whatever views may at one time have been entertained in *Pennsylvania*, upon this subject, the rule is now definitively settled, as will appear by reference to 2 *Binney*, 497. 3 *Serg. and Rawle*. 130, and 4 *Ib.* 226, that the witness is competent. The same remarks may perhaps be also made in reference to the State of *New York*, 9 *Johns.* 220, 3 *Cowen*, 252. And in this State it was determined as long ago as the year 1799, by the General Court, in the

case of *Peters vs. Beall*, 4 Harr. and McHen. 342, that where evidence was offered to the court, to show the interest of a witness, if it appear to the court he is not interested, he shall be sworn, *although the witness himself should think he has an interest*. Upon principle, there can be no propriety in rejecting the witness, for if he believes he has an interest, all the bias arising from the existence of such a belief, it might reasonably be presumed, would be removed when he is informed by the court that his belief was unfounded, and that in truth he had no legal interest. But if a bias should, notwithstanding, remain, it ought to go to his credit, and not his competency, there being no other safe standard of exclusion, than the existence of a legal interest. If it were to be considered, that the true test, was the witness's belief, he might, notwithstanding a release, disbelieve in its efficacy to discharge him. Nor can there be any propriety in rejecting a witness, who feels himself under an honorary obligation to pay the debt; for it has been well observed, that it would savour of inconsistency to discard a witness as unworthy of belief, whose honor coerced him to pay money, which the law would not compel him to pay. The same feeling which would induce him to pay the money, would more strongly prompt him to speak the truth.

But the case before the court is not one in which the witness, when called to the stand, swears he believes he has an interest in the event of the suit, or that he is under an honorary obligation to pay, unless there should be a recovery against the party, against whom he is called to testify; but evidence is adduced to show, that the witness, attempted to be excluded, had four months before the trial of the cause, been heard to say, that he felt himself bound to pay the plaintiff the amount in litigation in that suit, if the plaintiff did not recover. It is clear he had no interest in the event of the suit, and if he had any, it had been formally released. This case then presents the question, whether the *mere declaration* of a witness, as to his obligations, can render him incompetent to testify, although the witness shall palpa-

bly have mistaken his legal obligations, or viewing the declarations of the witness, as referring to a mere honorary obligation, whether *such declarations*, will exclude him from testifying? Now, if these declarations, when made by the witness on the stand, under oath, would not, and ought not, to exclude him, a *fortiori*; his statements and declarations, not under oath, ought not to exclude him; and even, if at the trial, his belief of his legal or honorary obligations rendered him incompetent, it would not follow that his declarations of such obligations, anterior to the trial, would, or ought to have the same effect: for his notions of his obligations may have undergone a change between the time of the making of such declarations and the trial—and at the time of the trial his mind might be free from all bias, which such belief might be calculated to produce; besides, the establishment of such a principle, would seem to lead to consequences subversive of justice in many cases, for the doctrine assumes, as has been well observed, the truth of unsworn statements, and enables an unwilling witness, *ad libitum*, to deprive a party of his testimony. In conformity with these views, the cases of 5 *Massa*. 261, and 8 *Massa*. 487, were decided.

The court are aware of the case of *Colston vs. Nichols*, decided by the Court of Appeals, under its former organization, 1 *Harr. and Johns*. 105, in which the decision of the General Court, that evidence of unsworn declarations of a witness were inadmissible to impeach his competency, was overruled—but this court cannot accede to the doctrine, that the adduction of such evidence, although it might be calculated to affect the credit of the witness, went to his competency.

The first exception having been waived by the appellant's counsel, it does not become necessary for us to express any opinion upon it.

JUDGMENT AFFIRMED.

PHILIP BLESSING vs. JOHN HOUSE'S LESSEE.—December, 1831.

In an action of ejectment where defence was taken on warrant, and plots were returned, the defendant offered in evidence a deed for "all that part or parcel of land lying and being in, &c. as has been willed by the said W, (the grantor) to his said daughter, (the grantee) as will more fully show by reference to the said last will and testament, bearing date, &c. for 100 acres, it being designated by the *Old Cabin Farm*, it being likewise to be taken from that part or parcel of land the said W bought of H, to be laid off by the said W's executors, at his death, for 100 acres;" and also offered in evidence another deed between the same parties, which purported to confirm the first deed. The second deed described the land by metes and bounds. The two deeds were offered as constituting one valid deed. The first deed was not located on the plots, the second deed was. The will of W was not produced, nor did it appear that his executors had laid off any land for the grantee. **HELD**, that the first deed was void for uncertainty—could not be read because not located, and that the second deed could not operate as a confirmation of the first.

No title paper in an ejectment, where defence is taken on warrant, can be read in evidence, unless it is located.

It is an essential attribute of a tenancy in common, that there should be a unity of possession; wherever, therefore, the tenure of the estate intended to be conveyed indicates a holding in severalty, or by particular or specific description, a tenancy in common cannot exist.

It is the office and operation of a deed of confirmation, to corroborate and give legal effect to a voidable, and not a void estate. It cannot work upon an estate void at law.

APPEAL from Frederick County Court.

Ejectment for a tract of land lying in *Frederick County*, called *More Bad than Good*, containing 265 acres.

The defendant (the present appellant) took defence on warrant, and plots were returned. Issue was joined upon the plea of not guilty.

At the trial, the plaintiff offered in evidence the patent for the tract of land called *More Bad than Good*, granted to *William House* for 265 acres on the 27th October, 1795. And then proved that the land is duly located on the plots by the plaintiff, agreeably to the courses and distances contained in the patent; that the tract of land called

More Bad than Good, has acquired by reputation, and is known in the county as and by the name of *The resurvey on More Bad than Good*. He then offered in evidence a deed duly acknowledged and recorded from *William House*, (the patentee) to *John House* the lessor of the plaintiff, for 76 acres and 25 perches of land, bearing date on the 9th August, 1817; and proved that the said deed is duly located on the plots.

The defendant then offered in evidence a deed from *Archibald Edmonson* to *John Holland*, dated 19th Dec'r, 1771, for 200 acres of land, called *Part of the resurvey on Drunkards not Mistaken*; and also for another tract called *Grog*, containing 54 acres of land, and then offered the deed from *John Holland* to *William House*, dated the 2d November, 1793, for the same lands called *The resurvey on Drunkards not Mistaken*, containing 200 acres, and *Grog*, containing 54 acres, and proved that said lands are properly located on the plots in this cause. The defendant then offered in evidence the following deed from *William House* to *Mary Harvey*: "This indenture made this 9th July, 1817, between *William House* of, &c., of the one part, and *Mary Harvey*, daughter of the said *W. H.* of the other part, witnesseth: that the said *W. H.* as well for and in consideration of the natural love and affection which he, the said *W. H.* hath and beareth unto the said *M. H.*, as also for the better maintenance, support, livelihood, and preferment, of her, the said *M. H.*, hath given, granted, &c., and by these presents doth give, grant, &c., unto the said *M. H.*, her heirs and assigns, all that part or parcel of land, lying and being in, &c., as has been willed by the said *W. H.* to his said daughter *M. H.*, as will more fully show by reference to the said last will and testament, bearing date the 4th July, in the year of our Lord, 1817, for 100 acres of land, it being designated by the *Old Cabin Farm*, it being likewise to be taken from that part or parcel of land the said *W. H.* bought of *Holland*, to be laid off by the said *W. H.*'s executors at his death, for 100 acres

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of land, together with all and singular the houses, buildings, &c., unto the said *M. H.* as aforesaid, or any part or parcel thereof belonging, or in any wise appertaining or therewith commonly held, used, occupied, enjoyed or accepted, reported, taken or known, as part or parcel of, or belonging to the same, and the reversion, and reversions, remainder, and remainders, rents, issues, and profits, of all and singular the said premises with their appurtenances, and all the estate, right, title, interest, property, claim, and demand whatsoever, of him the said *W. H.* of, in, and to, the said part or parcel of land and premises, and of, in, and to, every part and parcel thereof, with their, and every of their appurtenances. To have and to hold," &c. And also the following deed between the same parties. "This indenture made the 4th September, 1818, between *William House*, of &c., of the one part, and *Mary Harvey*, daughter of the said *W. H.* of the other part. Whereas the said *W. H.* did, by deed bearing date on or about the 9th July, in the year 1817, duly executed and recorded, convey or intended to convey to the said *M. H.* the land and premises hereinafter described and conveyed, and there appearing to be considerable defects in the said deed, from whence doubts have arisen, whether the same be sufficient in law to convey the said land to the said *M. H.* as thereby intended; to correct all errors and mistakes therein, and confirm the title of the said land in her the said *M. H.*, the said *W. H.* hath given this deed of confirmation. Now this indenture witnesseth, that the said *W. H.* as well for the causes above recited, and the natural affection and love, which he, the said *W. H.* hath, and beareth unto her the said *M. H.*, as for and in consideration of the sum of one dollar, current money, to him in hand paid by the said *M. H.* at or before the sealing and delivering these presents, the receipt whereof he, the said *W. H.*, doth hereby acknowledge, hath given, granted, &c. and by these presents, doth give, grant, &c. unto her, the said *M. H.*, her heirs and assigns, all that tract or parcel of land lying and

being in the county aforesaid, within the following metes and bounds, it being part of a tract of land called and known by the name of *More Bad than Good*; beginning for the same, at a white oak tree, standing to the westward of the house where the said *W. H.* now lives, marked for the end of the eighth line of a tract of land, called *The re-survey on House's new design*, it being also at the end of the thirty-first line of the said tract of land called *More Bad than Good*, and running thence, &c.—describing the land by metes and bounds, courses and distances—containing 98 acres of land, more or less, together with all and singular the improvements, &c.; to have and to hold the said tract or part of a tract or parcel of land, and every part and parcel thereof, unto the said *M. H.* her heirs and assigns, to the only proper use and behoof of her the said *Mary Harvey*, her heirs and assigns forever.”

The plaintiff objected to the admissibility of the first deed from *William House* to *Mary Harvey*, and the court sustained the objection, and refused to permit the same to be read to the jury. The defendant excepted, and the verdict and judgment being against him, he prosecuted the present appeal.

The cause was argued before STEPHEN, ARCHER, and DORSEY, J.

Palmer for the appellant, contended,

1. That the court below erred in rejecting the deed of the 9th of July, 1817, when offered in connexion with the deed of September 4th, 1818, both constituting one deed. The question then is, as to the admisability of the first deed—if it was evidence for any purpose, the judgment must be reversed; it can be affirmed only upon the ground of its being an absolute nullity. He insisted that the deed operated as a covenant to stand seised to the use of the grantee, and that a Court of Chancery need not be resorted to for the purpose of enforcing the covenant. The grantor

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could not resist this deed, and if he could not, neither can *John House*, who claims under the same grantor. *Jackson vs. Sebring*, 16 *Johns. Rep.* 524. 2 *Thos. Co. Lit.* 682, note 2. 2 *Will.* 62. After the execution of the deed, the father and daughter (grantor and grantee) became tenants in common; its design was a family settlement, securing to the daughter her proportion of his, the grantor's estate. The deed refers to the will of the grantor, dated July 4th, 1817, in which the land it intended to convey, is described as the *Cabin Farm*, which is a sufficient designation. By the will, he directed his executors to do, what he himself does, by his deed of September, 1818. This last deed is not a confirmation of the former deed, but a deed of partition, giving a specific description of the property. They are not relied on, as furnishing the ground for a recovery in ejectment. The party claiming under them is in possession, and merely relies on them to defend that possession. Considering *William House*, a tenant in common with his daughter, the grantee, he could not convey to *John*, any separate portion of the land, held in common with *Mary*. 4 *Kents. Com.* 364. *Hammond vs. Norris*, 2 *Harr. and Johns.* 146. *Thomas vs. Turvey*, 1 *Harr. and Gill.* 435.

2. If the deed of 1817 did not in itself contain a sufficient description, it was competent to the defendant to show by the deed of 1818, that the *Cabin Farm*, referred to in the first deed, contained a certain number of acres, and was sufficiently defined. *Jackson vs. Delancy*, 4 *Cowen*, 429, 432. That which can be rendered certain, is sufficiently certain. 4 *Cruise Dig.* 298. 1 *Thos. Coke*, 240. The first deed was to take effect after the death of the grantor, and refers to his will—if good at the time of its execution, subsequent events cannot make it bad. The first deed at the time of its execution, was certainly good as against the grantor. If he had died leaving the will referred to, the grantee could have compelled his executors to lay the land off, in conformity with the will—Chancery would have coerced them to do so. Though the deed may be de-

fective as such, it is still good as a contract, and Chancery will compel its specific execution. *Tiernan vs. Poor and ux.* 1 *Gill and Johns.* 221. *Beal and Lynn*, 6 *Harr. and Johns.* 533. *Hunt vs. Rousmaniere*, 1 *Peters*, S. C. 13. 2 *Piere Wm.* 242. 1 *Eq. Cas. Abr.* 286. *Sugden Vend.* 223, 523, 527. The deed of 1818 revokes the will *pro tanto*, and effectuates that which the testator designed should be done by his executors, after his death. If a Court of Chancery would enforce the deed as a contract, it cannot be absolutely void, and when enforced, it must take effect from its date. *Browne vs. Browne*, 1 *Harr. and Johns.* 430.

F. A. Schley and *Wm. Schley* for appellee,—referred to the plots in explanation of the conflicting pretensions of the parties. The defendant claims under a deed from *William House* to *Mary Harvey*, dated 9th July, 1817, and which was located by him, *according to the courses and distances of a second deed from said W. H. to said M. H. dated the 4th of September, 1818.* But the deed of the 9th July, 1817, was counterlocated by the plaintiff, *in such manner* as not to interfere with his location of his own pretensions; and as not to fall within the lines of the deed of 4th September, 1818. Thus the defendant claimed *title* under the deed of 9th July, 1817, and its true *location* was in issue, by reason of the plaintiff's counterlocation. The defendant offered both the deeds at the same time, and as forming together *one deed*. The objection was *exclusively* to the prior deed. The sole question, therefore, presented by the record is, whether the deed of 9th July, 1817, was admissible in evidence, or not? They made the following points:—1. That said deed was not admissible, *per se*, as an independent instrument, either to prove *title* or *location*. 2. That it was not admissible, *in connexion with the second deed*, as evidence for the defendant, for any purpose.

1. The deed was not admissible *per se*. It is void for uncertainty. Every deed must comprehend sufficient certainty of the lands or tenements intended to be conveyed.

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2 *Thomas Co. Lit.* 240. And such certainty must be collected from the terms of the deed, of which the court are to judge:—matter *in pais* cannot be resorted to, except in cases of latent ambiguity. *Carroll vs. Norwood*, 5 *Harr. and Johns.* 163. Where the ambiguity is patent, the deed is void, either absolutely, or except on the ground of election, according to circumstances. *Hammond vs. Norris*, 2 *Harr. and Johns.* 147. *Huntt & Parks vs. Gist*, 2 *Harr. and Johns.* 505. *Thomas vs. Turvey*, 1 *Harr. and Gill*, 438. The decisions in this court upon cases of judicial sales, where the returns of sheriffs have been quashed for uncertainty in the description of the premises, are in point. In those cases it was held, that such certainty was necessary in a return, as would enable the officer, upon a *habere facias possessionem*, to deliver possession of the premises. *Fenwick vs. Floyd*, 1 *Harr. and Gill*, 172. *Clark vs. Belmeear*, 1 *Gill and Johns.* 448. *Express* certainty in the description is not necessary; if there be a reference in the description to something *aliunde*, a recurrence to which will establish the certainty of the premises, such *demonstrable* certainty will suffice. They referred to the deed to shew, that it does not contain any *express* certainty. The *name of the tract*, whereof the part intended to be conveyed is parcel, is not even given; no *muniments* are designated; no *courses and distances* mentioned. They insisted that it does not comprehend the requisite *demonstrable* certainty. Strictly speaking, there is but one reference; and that is to the grantor's will of 4th July, 1817, and what follows is mere recital from the will. But at the utmost, there are but four matters *aliunde*, by which the certainty of the premises might be established. (1.) *The grantor's will*. Where is that will? What was the part therein devised to *Mary Harvey*? No such *will* was offered in evidence; no such *devise* was located on the plots. The deed could not, therefore, have been received on the suggestion, that the defendant might have afterwards produced the will. As the *devise* was not located he could not offer

any such evidence. *Carroll vs. Norwood*, 1 Harr. and Johns. 177. (2.) *The Old Cabin Farm*. This is, manifestly, not given as an independent description; but is mere recital from the will, *wherein* the land devised to M. H. was designated as the *Old Cabin Farm*. But as an independent reference it cannot avail. The defendant did not locate the *Old Cabin Farm*, and could not, of course, have offered any evidence to show, that *its* boundaries agreed with his location of said deed. (3.) The part intended to be conveyed, *was to be* taken from that part of the grantor's land, which *he had bought from Holland*. The purchase from *Holland* is located, and consists of 254 acres. The part intended to be conveyed is only 100 acres. This was a case for election, but it was never made; or if made, such election is not located, and could not therefore be proved. It comes within the principles of *Huntt and Parks vs. Gist*, already considered. (4.) The part "intended to be conveyed" *was to be* laid off by the grantor's *executors at his death*. It was to be ascertained by the exercise of a *future* power. It is sufficient to say that it does not appear that *William House* is *dead*; or that he appointed *executors*; or that the *power* was ever exercised:—if exercised, as it is not *located*, no evidence could be received of the lines of the part laid off. The deed, therefore, in point of law, was merely void and inoperative. It could not be evidence of *title*; and having no properties whereby it could be located, and there being nothing on the plots to aid it, it could not be received in support of the defendant's locations. In the case of *Hammond vs. Norris*, there was no counterlocation of the defective deed. The question of *title* alone was in issue in that case; here *location* is also in issue. Where a location is made by one party, and no counterlocation thereof by the adversary, the location is admitted to be true. *Hughes vs. Howard*, 3 Harr. and Johns. 13. In that case, therefore, the deed was properly read to the jury, in explanation of the manner of its location. But when offered to prove *title*, it was declared to be void for uncer-

tainty, and not to be “a locatable deed.” The decision in that case, is conclusive upon the questions in this. But it has been urged that the deed may be upheld *as a covenant to stand seised* to the use of *Mary Harvey*. To stand seised *of what?* The same certainty is required in such a deed, as in a deed of bargain and sale. The only distinction between *a covenant to stand seised*, and a technical *bargain and sale*, arises from the nature of the *consideration*, and not the *form* of the conveyance;—a *pecuniary* consideration being indispensable to the latter, whilst a merely *good* consideration would avail to support the former. 2 *Saund. on Uses and Trusts*, 46, 79. Both are *deeds*; and are construed by the same rules. Before the statute of uses what difference was between them? They were both considered as mere *declarations of uses*, operating without transmutation of possession—in the one case, on the possession of the *bargainor*, to raise an use in favor of the *bargainee*; in the other, on the possession of the *covenantor*, to raise an use in favor of the *covenantee*. In either case, livery of seisin would have made a *feoffment*, and would have operated by transmutation of possession, to vest the seisin in the bargainee or covenantee, who would have become the feoffee. The statute of uses, in both cases, by a legal transmutation, annexes the possession to the use. 2 *Thos. Co. Litt.* 578. 2 *Inst.* 671. But the statute can only operate a legal transmutation, where *livery of seisin* in fact would have made a *feoffment*. And is not *certainty of the premises* inseparable from the notion of livery? 2 *Thos. Co. Litt.* 334. Again:—It has been urged that the deed is good as creating *a tenancy in common*. This cannot be. The part ‘intended to be conveyed’ was intended to be held by her *in severalty*, and not *pro indiviso*. It is only necessary to recur to the definition of a tenancy in common, to break the force of this argument. 2 *Bl. Comm.* 195. 1 *Thos. Co. Litt.* 892.

It is the peculiarity of the estate of tenants in common, that neither can tell which part is his own. As Lord Coke

says, it is *pro indiviso*. As soon as the *particular part* is determined, it ceases to be a tenancy *in common*. It must be a holding *in common of every part* of the land. 2 *Black Com.* 192. *Co. Lit.* 188, b. In the deed he does not convey it as an *undivided part*. A moiety, a third, or any other part of a tract, or any other words to shew that there is a remaining part for him. Here he conveys it as “all that part or parcel of land as has been willed by him to her, as will more fully show by his last will and testament, bearing date, &c.; it being *designated* by the *Old Cabin Farm*.” Unity of possession is the essence of this kind of estate. That is, a possession pervading the *whole* estate. Yet by this deed he confines her right to 100 acres, and designates these 100 acres as *the Old Cabin Farm*, and as the land willed to her for 100 acres, as by his will, will more fully show, &c. By the deed, called by the defendant a deed of confirmation, and offered in evidence by him, he shows that he meant to convey by the first deed a specified quantity, and by *defined limits*. If then the 2d deed is to show the nature of, and explain and confirm the first, and they are *both* to be received as *one*; there certainly can be no tenancy in common.

2. The first deed was not admissible *in connexion with* the second. (1.) The second deed cannot avail to confirm the first. It may operate as an *original* deed, and as such was evidence, nor was it objected to by the plaintiff. But it cannot relate to the first deed, and make that good. A confirmation doth not *create* a right—it can only make sure a right *in esse*. *Confirmatio omnes supplet defectus, licet id quod actum est ab initio, non valuit*. It doth not strengthen a void estate:—*ubi donatio nulla omnino, nec valebit confirmatio*. 2 *Thos. Co. Litt.* 516. It has been admitted, however, that the second deed cannot be good as a confirmation. But it is insisted:—(2.) That it is good as *a deed of partition*. But this presupposes that the grantor and grantee were *tenants in common*. It has sufficiently been shewn that the prior deed could not create

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such a relation. If it did create such a relation, then it would have been evidence independent of the second deed. Its effect in evidence would have been an after inquiry.

Ross in reply. The exception presents an isolated question, respecting the admissibility of evidence, no way connected with its effect; the exception is predicated upon the assumption, "that a deed which does not define the land intended to be conveyed with sufficient certainty, so as to convey locatable land, is absolutely void, and has no legal existence for any purpose." The exception is made, not to any of the formalities of the deed—these are all admitted. Under the circumstances of this case, the question naturally presents itself, as to the legal character of the deeds of the 9th July, 1817, and 4th September, 1818.

William House lived upon a piece of land called *the Old Cabin Farm*. Its limits and locations were well known; a portion of it was included in the lands he purchased of *John Holland*. His daughter *Mary Harvey* lived with him. He, for the consideration of love and affection, settled upon his daughter *M. H.* 100 acres of land, and described it as in the deed of the 9th July, 1817. By this deed he conveys 100 acres of *the Old Cabin Farm* to *M. H.*,—and had he not a right to convey a portion of that farm, without any other description than 100 acres of the *Old Cabin Farm*, or the one-third or fourth of it? and if he did, and as in this case for the consideration of blood, is it not a legal instrument? Is it not a covenant to stand seised to the uses, and does not the statute transfer the possession to the use? Does not *M. H.* under that deed hold 100 acres of the *Cabin Farm*, and her father the residue—not that she holds 100 acres by defined metes and bounds, but that she holds an undivided interest to the extent of 100 acres, her father holding the residue, and she holds this undivided interest as a tenant in common with her father, as long as he lives, according to the terms of the deed; after his death the executors are to lay it off, and

when it is laid off, either by the executors or by *William House*, the tenancy in common is dissolved, and she becomes a tenant in severalty. The deed of the 4th of September, 1818, operated only as a deed of partition; it only operated on the possession, and changed *M. H's* interest in the possession, and had no influence on her right or title to the land. That is not a deed of confirmation, nor has it ever been so considered by the appellant's counsel. A deed of confirmation supposes a defective deed, which it is designed to perfect or confirm; the deed of the 9th July, 1817, was perfect in itself for the purposes of its creation; it conveyed the right to the 100 acres: the deed of the 4th September, 1818, like all deeds of partition, only dissolved the unity of possession held by *M. H.* with *W. H.*, under the deed of the 9th of July, 1817. These deeds ought to have been received in evidence as one deed, tending to the same subject matter.

Is not the deed of the 9th July, 1817, considering it as constituting *M. H.* a tenant in common, properly located? How can a tenant in common, a defendant, locate his defence? only by locating the whole tract, and showing his title to his interest in the same.—*M. H.* locates the *Old Cabin Farm*, and the whole of the purchase of *Wm. H.* from *John Holland*, to wit, the 254 acres, and then produces her deed of the 9th July, 1817, to show her interest in 100 acres of the *Old Cabin Farm* as laid off, of the 254 acres purchased of *Holland*. The above views are founded upon the supposition that the land in the deed of the 9th July, 1817, is not defined, &c. The question now arises,—Is not the description of the land sufficiently designated to ascertain and identify the 100 acres intended to be conveyed? Lands often receive a name by reputation, and will pass by that name. The extent of a farm is also often known by reputation. The farm in this case is called *The Old Cabin Farm*, it being likewise to be taken from that part, or parcel of land, *W. House* bought of *Holland*. Here are two points of description, and both well known; the land purchased of *Hol-*

land, is ascertained by course and distance ; and the defendant was prepared to prove the locations of *The Old Cabin Farm*. How then can the defendant have the benefit of this proof unless by locating the deed of the 9th July, 1817, as he expects to prove it? The appellant's counsel knows no other means to render that certain, that appears to be uncertain, until the explanation is given by means of location, and proof to establish it. The deed must be received in evidence to show how it is located. How can the defendant show the jury how he has located a paper or deed, unless he is permitted to read it? The reading of the deed to the jury makes it evidence neither of title nor of location ; to establish title or location is the effect of evidence, but it must be read in evidence, before the title or the location can be made the subject of investigation by either the court or jury.

That a deed cannot be read in evidence unless it is located, has long been the received law in ejectment cases in *Maryland* ; but that a deed or paper properly certified or proved cannot be read to a jury, to show how the party who claims under it, has located it, is, it is presumed, now for the first time to be decided.

Should it be said here, as it was below, that the deed of the 9th July, 1817, refers to a will of the 4th July, 1817 ; and as that will requires the 100 acres to be laid off by *Wm. H's* executors, the will should have been located. The appellant's counsel again replies, that if the will was in existence, the appellant had no knowledge of it ; that *William House* died long before this suit was instituted, and the will of the 4th July, 1817, was never submitted to probate ; it is said it was destroyed,—it was certainly revoked *pro tanto*, as to the 100 acres by the deed of the 9th July, 1817, and the power to the executors to lay off the 100 acres, was executed by *Wm. House* himself, by his deed of the 4th Sept. 1818.

The deed of the 9th July, 1817, had for its object a family settlement,—its consideration is founded in natural affection, and it is to receive a benign and liberal construc-

tion. 16 *Johns. Rep.* 524, and the cases there cited. This deed having every requisite necessary to constitute it a covenant to stand seised to the uses, it must be so received, and is now, since the statute of 27 *Henry 8th*, ch. 10, considered a statutory conveyance. 2 *Tho. Co.* 682, note 2, *Am. Ed.* *West vs. Biscoe*, 6 *Harr. & Johns.* 465. 1 *Dallas*, 137. If the deed of the 9th July, 1817, cannot operate as a covenant to stand seised if it does not convey locatable land;—it may operate as a contract, which a Court of Chancery would enforce. There are a number of contracts which a Court of Equity would carry into effect, on which the statute would not operate. The court will lean towards giving validity to a deed;—if it can not have operation in one way, it may operate in some other way. 1 *Harr. and Johns.* 531–2. If the deed of the 9th July, 1817, was the contract of *Wm. H.* and he was bound by its engagements, whether it be the actual conveyance of 100 acres to *M. H.* as a tenant in common or in severalty, or as a covenant to convey 100 acres, still it was his contract, and being legally proved, it ought to have been received in evidence, as part of the defendant's defence; as to its effect in proving title or location in the defendant, that is a distinct question from its admissibility as evidence.

The deed of the 9th July, 1817, constitutes *M. H.* a tenant in common with *W. H. ex vi termini*; she was to hold the 100 acres undivided until after his death. If *Wm. H.* and *M. H.* are tenants in common, then he could not convey a distinct portion of the estate by metes and bounds, so as to prejudice his co-tenant. As against *M. H.* the deed to *John House* of the 9th August, 1817, is inoperative and void; 4 *Kent's Com.* 364, and the cases there cited, 2 *Con. Reps.* 243. 4 *Ib.* 485. 5 *Ib.* 363. If the deed of the 9th July, 1817, from *Wm. H.* to *M. H.* constitutes them tenants in common, though it should convey no locatable land, it shews an interest in the land to the extent of 100 acres, in *M. H.*; and if not sufficient to give her a title to a defined, specific 100 acres, it is sufficient to show the title to the 100

acres out of the plaintiff, and having this legal operation, it ought to have been received in evidence, to show title cut of the plaintiff. Suppose the will of the 4th July, 1817, had not been set aside by *W. H.*'s subsequent arrangements, and his executors had laid off the 100 acres, as *Wm. H.* himself, by his deed of the 4th September, 1818, had located it. Would not the partition of it thus, by his executors, have been received as the legal execution of their trust; if done by parol, it would have been good as a parol partition; if by deed, it would be good as a partition by deed; and could not *W. H.* do what he directed his executors to do? And what has he done by his deed of the 4th September, 1818, but laid off to his daughter the 100 acres, the title or interest to which he gave her by the deed of the 9th July, 1817? If the executors had made the deed of partition, their deed would not have created the title to *M. H.*; her interest was acquired by the deed of the 9th July, 1817, and the deed of partition of the executors only dissolved the unity of possession, and made her a tenant in severalty. On a partition, each has his own land, as he held it before partition; by partition he acquires a different interest in it. Thus, before partition, his interest was as tenant in common; after partition, his interest was as tenant in severalty. 1 *Thomas' Coke*, 828, note *R.* The appellant's counsel think there is an essential difference between the case of *Hammond and Norris*, 2 *Harr. and Johns*. 131, and the case at bar; in the case under consideration, the deed of the 9th July, 1817, was regularly proved and produced, it was offered to show how it was located, and being thus offered, its validity was not, and could not then be made a question. The deed must first be admitted, before its legal operation can be investigated. But in the case at bar, it was not permitted to be read to the jury, even to show that it was located on the plots, and how located. In the case of *Hammond vs. Norris*, the deed was received to show how it was located.

In the case of *Hammond vs. Norris*, the deed of mortgage was again offered to prove the location of the 86 acres, and

86 acres, and was again objected to. And the court refused the same to be read to the jury, to prove the location of the 86 acres, upon the ground that nothing but the deed from *Joseph Wood* to *John Howard* for the 86 acres, can prove the location of the land recited in the deed of mortgage then offered to be read to the jury. The Court of Appeals will immediately perceive the ground upon which the deed of mortgage in *Hammond vs. Norris* was rejected, and how could the court have decided otherwise? The mortgage deed was no deed as to the 86 acres. How could it then be read to show its location? A location is intended to represent the figure of the land on paper, as claimed by a plaintiff or defendant. The location does not establish the title; it is intended to represent the land, but that which has no being, cannot be represented. Besides, the mortgage deed had no courses or distances—no point to ascertain and identify the 86 acres intended to pass. But in the case at bar, the deed of the 9th July, 1817, though it contains no land described by courses and distances, it has certain points of designation, to ascertain and identify the 100 acres intended to pass by the deed, and the appellant was prepared with proof to ascertain and identify the 100 acres located by him, as the 100 acres intended to be conveyed by *William House* to *Mary Harvey*.

Again, the question in *Hammond vs. Norris*, when the deed was offered, was made to the validity of the deed to prove location. A question very different from the admissibility of evidence. They arise in different stages of the trial. 2 *Peters' S. C. Repts.* 44.

When the deed of mortgage was offered to be read to the jury to show how it was located, it was admitted. But in the case at bar, the deed was not permitted to be read to show how it was located; the case relied on, therefore, was an authority directly in opposition to the exception made by the plaintiff to the evidence offered by the defendant.

Blessing vs. House's Lessee.—1831.

The appellant's counsel contends the court below were in error in refusing to permit the deeds of the 9th July, 1817, and 4th Sept. 1818, to be read to the jury, for the following reasons: 1st.—The deed of the 9th July, 1817, was the agreement or contract of *W. H.*, creating a legal obligation of some character. If not a deed sufficiently descriptive to convey locatable land, it gave the grantee an interest in the 100 acres as tenant in common with *W. H.*; or it was an agreement that could be enforced in a Court of Chancery against him. In any of these cases it was a legal contract against *W. H.*, and as such, ought to have been received in evidence; and if *John House* had actual or constructive notice of its existence, he took his deed of the 9th of August, 1817, subject to the use or equitable interest that *M. H.* had in the 100 acres. 2d.—The deed of the 4th September, 1818, ought to have been received as a deed of partition, as dissolving the unity of possession between *W. H.* and *M. H.*; it was not a distinct deed, conveying a distinct right, and it ought to have been received in connexion with the deed of the 9th July, 1817, as ancillary thereto.

STEPHEN, J., delivered the opinion of the court.

After referring to the evidence, the judge said :—The sole question, therefore, which this court is called upon to decide is, whether the first mentioned deed was legally operative and admissible, as evidence to go to the jury for the purpose for which it was offered, or in other words, whether the deed was not legally defective for uncertainty in the description of the property intended to be conveyed? The deed has reference to the will of *William House*, to identify the land, which it was intended to transfer to *Mary Harvey*; and the question therefore necessarily arises, whether the will is not equally and essentially defective in the description of the property it was intended to convey? And upon mature deliberation we think it unquestionably was. By the will of *William House*, it was designated by the name of the "*Old Cabin Farm*, it being likewise to be taken

from that part or parcel of land the said *W. H.* bought of *Holland*, to be laid off by the said *W. H.*'s executors at his death, for 100 acres of land." The *Old Cabin Farm* was not located on the plots, nor was there any location of the land as laid off by the executors of *W. H.* according to the provisions of his will. There was, therefore, no location on the plots to which the deed offered in evidence could apply, and the principle is well settled, that no title paper can be offered in evidence unless it is located. The deed we think was defective for uncertainty. It referred to the will to ascertain the land it was intended to convey. The will did not specify with certainty or precision the land devised; it was to be laid off by *W. H.*'s executors at his death. There was no proof in the cause that the executors of *W. H.* ever had executed the duty or trust devolved upon them by the will, and the reference by the deed to the will, does not therefore cure or remove the ambiguity. It was contended by the counsel for the appellant, that although the deed from *W. H.* to his daughter *M. H.*, did not operate to convey any specific quantity of land to his daughter, by reason of its ambiguity in the description of the land intended to be conveyed, yet that it might operate as conveying an undivided interest, and make *M. H.* a tenant in common with *W. H.*, and that the deed of the 4th of September, 1818, might operate as a deed of partition. But to this proposition we cannot accede. We do not think that the deed from *W. H.* to *M. H.* operated to make them tenants in common. It is an essential attribute of a tenancy in common, that there should be a unity of possession; wherever, therefore, the tenure of the estate intended to be conveyed, indicates a holding in severalty, or by particular or specific description, a tenancy in common cannot exist. *1st. Tho. Co. Lit.* 875. "Tenants in common are they which have lands or tenements in fee simple, fee tail, or for term of life, &c. and they have such lands or tenements by several titles, and not by a joint title, and none of them know of this his several, but they ought by the law to occupy these lands or

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tenements in common, and *pro indiviso* to take the profits in common. And because they come to such lands or tenements by several titles, and not by one joint title, and their occupation and possession shall be by law, between them in common, they are called tenants in common.” In this case, the 100 acres were to be laid off by executors, and the devisee was to hold them exclusively in her own possession, which provision in the will is wholly destructive of the idea of a tenancy in common, to which estate, a unity of possession is essential. Neither can the deed of the 4th of September, 1818, operate as a deed of confirmation: because it is the office and operation of such a deed, to corroborate and give legal effect, not to a void, but voidable estate. A confirmation does not strengthen a void estate; for a confirmation may make a voidable or defeasible estate good, but cannot work upon an estate that is void in law. 1 *Cru. Dig.* 105. It was contended by one of the counsel for the appellant, that though the first deed might be defective and inoperative at law, yet that it might be available in equity as a contract, which a Court of Chancery would enforce. Admitting that Chancery will aid defective conveyances by parents making provision for children. 1 *Vernon*, 132. 1 *Fonb.* 349. Yet it must be remembered, that the parties in this cause were litigating in a court of law, and whatever might have been the equitable rights of *Mary Harvey*, they could not avail her as matter of defence in the action of ejectment; nor is it believed that equity would have enforced the first deed to the prejudice of *John House*, who was a subsequent purchaser for valuable consideration without notice. We are also of opinion that the principle established by the case of *Hammond vs. Norris*, 2 *Harr. and Johns.* 130, is strictly applicable to the case now before this court. In that case, the plaintiff having located on the plots, a deed from *John Howard* to *Philip Hammond*, offered in the first bill of exceptions, to read in evidence a deed bearing date the 27th of September, 1753, being a deed of bargain and sale by

way of mortgage, conveying unto *Hammond* all those two parcels of land being parts of a tract of land called *Wood's Inclosure*, and sold to the said *John Howard* by *Joseph Wood*, one parcel containing 86 acres, the other 94 acres as by deed duly made and recorded in the records of *Frederick* county appears; the said two parcels of land being also what the said *J. Howard's* dwelling plantation is made upon. In the second bill of exceptions, he then produced and offered to read in evidence the said deed from *J. Howard* to *P. Hammond*, dated the 27th of September, 1753, herein before mentioned in the first bill of exceptions, and showed that the 86 acres of land therein mentioned were located by him on the plots, beginning at the end of the 27th line of *Wood's Lot*, as located by him at black A, and running, &c. to the beginning. "*Chase, Ch. J.* The deed from *J. Howard* to *P. Hammond* of the 27th September, 1753, does not sufficiently specify the land, being for 86 acres and 94 acres, parts of *Wood's Inclosure*, conveyed by *Joseph Wood* to *John Howard*, as appears by deed recorded in *Frederick* county, but the deed thus referred to, cannot be found. This deed does not define the 86 acres by any courses or distances, there is therefore, nothing in it whereby any locatable land can be conveyed, and of course passes nothing, and passing nothing, it cannot be evidence. Nothing but the deed itself, can prove the location of the land recited in the deed now offered to be read to the jury. The court are therefore of opinion, that the deed from *J. Howard* to *P. Hammond* is not legal evidence to show title in *Hammond* in the 86 acres of land, part of *Wood's Inclosure*, as located on the plots by the plaintiff, or to support his location of the same, without producing the deed from *Joseph Wood* to *J. Howard*, to which the deed from *J. Howard* to *Hammond* doth refer, to ascertain and identify the 86 acres intended to pass by the same, and that the deed is inoperative to pass the same, without producing that deed. The court refuse therefore to suffer the same to be read to the jury." This court are of opinion that the principle in-

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volved in that decision, is decisive of the question now before this court, and that the judgment of *Frederick County Court* ought therefore to be affirmed.

JUDGMENT AFFIRMED.

THE STATE vs. LEVIN DOWELL.—*December, 1831.*

It is sufficiently certain in an indictment to describe the article stolen as "one hide of the value," &c.

ERROR to *Calvert County Court*.

An *Indictment* had been found against *Dowell*, by the grand jury of *Calvert county*, in the following words:

"The grand jurors of the State of *Maryland*, for *Calvert county*, upon their oath do present, that *Levin Dowell*, late of said county, yeoman, on the 10th January, 1830, with force and arms at the county aforesaid, one hide of the value of one dollar current money, and one other hide, of the value of one dollar, current money, of the goods and chattels of *James Kent*, and *Daniel Kent*, then and there being found, feloniously did steal, take, and carry away, against the act of Assembly in such case made and provided, and against the peace, government, and dignity of the State."

Upon the plea of not guilty, there was a verdict for the State.

The defendant then moved in arrest of judgment upon the ground. 1st. That the indictment does not describe the kind of hides charged to have been stolen. 2d. That the indictment charges the stealing of two hides, and the proof in support of that allegation is, that the accused did steal an ox hide, and a calf skin. The County Court sustained the motion, and arrested the judgment. The present writ of error was thereupon taken out.

Diffenderffer vs. Winder, *et ux.*—1831.

The cause was argued before BUCHANAN, Ch. J., EARLE, MARTIN, STEPHEN, and ARCHER, J.

Boyle for the State, after referring, upon the question of the certainty required in indictments, to 5 *Coke*, 125. *Russel on Crimes*, 1147, 1181. *Cowp. Rep.* 682. 2 *East. Crown. Law*, 777, 602, 616. *Archbold, C. Plea.* 130. 3 *Maul. and Selw.* 539, was stopped by the court, who REVERSED THE JUDGMENT, AND AWARDED PROCEDENDO.

JOHN DIFFENDERFFER vs. WINDER, *et ux.*—December, 1831.

D, in 1815, voluntarily assumed a trust over certain real property, to a part of the rents of which the complainants were entitled, and from that period until 1828, from time to time, every year, received large sums of money from the estate, which he continually employed in trade and speculation. To the bill against him for an account, he filed more than one defective answer, withholding the discovery sought for. He claimed the whole trust fund, in one answer, as belonging to his wife and children, who really owned a part; while in another, he set up an unfounded stale claim in a stranger, to a part of the fund. He endeavored in the progress of the cause to stifle the inquiry as to the use he had made of the money received, or the profits which had accrued from its use. He neither paid nor offered to pay the *c. q. t.* complainants any thing. HELD, that under the circumstances he was liable to pay compound interest, estimation on the balance in his hands at the end of each year; and that having kept full and fair accounts of his receipts and expenditures, and in that respect faithfully discharged his duty as trustee, he had not forfeited all claim to commissions, but was entitled to half commission—5 per centum.

Where the Appellate Court reverses the decree of the Court of Chancery, it exercises as it were an original equity jurisdiction, and places that decree upon the record, which the Chancellor ought to have given. Upon cross appeals, therefore, from the same decree, errors of which one party below, since the Act of 1825, could not have availed himself upon his appeal, because not excepted to, may be corrected by this court in remodelling the Chancellor's decree upon the appeal of the other party.

The Court of Appeals will direct an audit to be made, and new accounts stated, where it is necessary to enable them to pass a final decree in the cause.

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Accounts stated by the auditor of the Court of Chancery which have not been confirmed by the Chancellor, are no evidence of the truth of the facts assumed by the auditor in stating them.

Where trustees act *bona fide* and with due diligence, they have always received the favor and protection of Courts of Equity, and their acts are regarded with the most indulgent consideration. Where they have betrayed their trust—grossly violated their duty, or been guilty of unreasonable negligence, their acts are inspected with the severest scrutiny, and they are dealt with according to rules of strict, if not of rigorous justice.

Cross appeals from the Court of Chancery.

On the 8th August, 1825, the appellees, *William S. Winder*, and *Araminta* his wife, filed the present bill against the appellant, and *Amelia*, *Michael*, and *Charles R. Diffenderffer*, the minor children of the appellant, charging, that in the year 1805, a certain *Charles Rogers* being seised of a considerable real estate in the city and county of *Baltimore*, duly made his last will and testament, and without revoking the same, departed this life at the close of the said year, leaving four children, to wit, *Ann Martin*, *Mary Lee*, *Catharine Rogers*, and *Sarah Bailey*, the mother of the complainant, *Araminta*. That the testator devised his estate to certain trustees, to hold the same upon the trusts by the will disclosed, and also devised all his real estate fronting on *Baltimore* and *Calvert* streets, except forty feet at the north, to be divided into three equal parts by the trustees, and to be by them held, to, and for, the sole and separate use of the testator's three youngest daughters, *Ann*, *Mary*, and *Catharine*, during their natural lives, as tenants in common, free from the control of their then, or future husbands, and after their death, then in trust for the children of such daughters as tenants in common, and by said will made the following devise. "The residue of my real estate situate in the city of *Baltimore*, or elsewhere, it is my will and desire, that my said trustees, and the heirs of the survivor of them, hold the same in trust to and for the sole and separate use and behoof of my said three youngest daughters, *Ann*, *Mary* and *Catharine*, as tenants in common, without the control or interference of any future

or present husband, each to receive the rents and profits of the same, and to give receipts, either to the tenants, or my trustees, and from and immediately after the decease of each of my said three daughters, then in trust, to and for all and every of the child and children of said daughters, their heirs and assigns, as tenants in common, such child or children to have the share of its, or their parent; to wit, the one-third part of said last mentioned premises, leaving the two-thirds to my surviving daughters, and in case of the death of two of them, then leaving the one-third to the survivor; the remaining two-thirds vesting in the issue of my deceased daughters, *per stirpes*;" and further devised, "If any of my children, to wit, *Sarah Bailey, Ann Martin, Mary Lee, or Catharine Rogers*, die without leaving issue at the time of their death, or if leaving issue, they die without issue before they arrive at the age of 21 years; it is my will that my trustees, and the survivor of them, &c. hold his, her, or their share or shares, if more than one, in trust, to and for all my surviving daughter or daughters; and the issue of any daughter, is to be considered as a surviving daughter, and to represent the mother or parent *per stirpes*; where any limitation in this will is made to children or daughters, my meaning is, that the same comprise their issue, that is, my grand, great grand-children, and so *in infinitum*; and they are to take *per stirpes*, to wit, issue, to take any one of my daughter's share, it being my intention that no one part, or share of my property, on the death of any of my daughters, shall go to the surviving sister, as long as children, or issue shall represent any of my deceased daughters," as by reference to the will exhibited with the bill appears. That the said *Ann Martin* and *Mary Lee*, have departed this life, without leaving any children or issue whatever. That the said *Sarah Bailey* hath departed this life, leaving the complainant *Araminta*, since married to the other complainant, her only child and heir at law. That *Catharine Rogers* married *John Diffenderffer*, (the appellant) by whom she had four children, one of whom died unmarried, and

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without issue, and *Amelia*, *Michael*, and *Charles R.* three of the defendants are her surviving children, all of whom are minors, and that *Catharine*, the mother is dead. That since the death of the said *Ann Martin* and *Mary Lee*, the said *John Diffenderffer* asserting that his children are entitled to the whole of the property mentioned in the several devises, hereinbefore stated, has taken possession of all such property, rented out the same, and received the rents and profits thereof, to a large amount, to the exclusion of the complainant, *Araminta*, who as the complainants charge, is entitled to one-half of the shares belonging to the said *Ann Martin* and *Mary Lee*, the children of said *Diffenderffer* being entitled to the other half. The bill further stated, that the trustees named in the will have refused to accept the trust, and none others have been appointed by any competent authority. That frequent applications have been made to *Diffenderffer* for an account of the moneys received by him, and a discovery of the property to which *Ann Martin* and *Mary Lee* were entitled under the aforesaid will, and where the same is situated; and for a fair and equal division thereof, which has been refused. The bill sought information on all these subjects; and *prayed* that *Diffenderffer* may come to a full and fair account for the rents and profits of said property, and for a division of the same, and for further relief.

The answer of the appellant admitted the death of *Charles Rogers*, the testator, as stated in the bill, and that complainants exhibited a true copy of his will. That he left four children as stated, and that *Catharine Bailey*, one of them is dead, leaving the complainant, *Araminta*, her only child, and heir at law. The marriage of the complainant is also admitted; and that *Ann Martin* and *Mary Lee* have departed this life without issue; the former on the 5th of May, 1807, the latter on the 21st of January, 1808. That *Catharine Rogers* intermarried with the respondent, and that she has since died, to wit, on the 30th June, 1818, leaving four children, one of whom thereafter died, as

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charged in the bill. The answer then states, that the trustees refused to accept the trust as stated, in consequence whereof, an application was made on behalf of the parties interested, to have a trustee appointed to execute the trusts of the will; that thereupon one *Samuel Vincent* was appointed by the Chancellor some time about the year 1806, for that purpose, who took upon himself the duties of said appointment, and continued to discharge them up to the year 1815, when from the infirmities of age and disease, he became incapable of executing them further. That *Vincent* from time to time, settled his accounts in the Court of Chancery, and paid over to this defendant sundry sums of money received from the said trust fund, on account of the distributive share of his wife; by which, and by an account stated by the auditor of the Court of Chancery, it will appear, that there remained a large balance due to his said wife, whilst the other parties received more than their proportions. The answer further states, that when said *Vincent* became incapable as before mentioned, from further fulfilling the duties of trustee, he required this defendant to take possession, and receive the rents and profits of that part of said trust estate, which belonged to his wife, and descended to her children as aforesaid. That the defendant accordingly took possession of the property on *Calvert* and *Baltimore* streets, devised as aforesaid in trust, for the benefit of the said *Ann Martin* and *Mary Lee*, and the said *Catharine Rogers*, (married to defendant) and also of sundry ground rents, devised in the same way, which he is advised he had a just and legal right to, by virtue of the aforesaid will, and the death of *Ann Martin* and *Mary Lee*, upon which the said estate, so taken possession of by him, descended to the said *Catharine*, and after her death, to her aforesaid children. That from the 16th of January, 1815, to the 28th of November, 1825, he hath received, deducting sundry disbursements, for taxes, repairs, &c. the sum of \$24,149 35½ of which he hath a particular account, ready to be produced when necessary, in the future pro-

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gress of the cause. That he did not take possession of, or receive the rents and profits, of any other of the estate of the said testator, than as stated above, &c.

Upon exceptions to the above, an amended answer was filed, exhibiting a particular account of the receipts of, and expenditures by, the defendant, on account of said estate.

The infant defendants answered by their guardian, denying all knowledge of the facts stated in the bill, and putting complainants to the proof of the same.

Afterwards by consent of parties, the defendant, *John Diffenderffer*, at March term, 1828, filed an amended answer, exhibiting a deed executed by *Ann Martin*, and *Alexander Martin*, her husband, dated the 8th of October, 1806, to a certain *Levin P. Barnes*; and a deed from the said *Barnes*, dated on the first day of April, then following, to a certain *William Hickborn*, whereby as he alleged the entail of the estate was docked, and the said *Hickborn* became, and was seized of an absolute estate therein in fee simple, in trust, for the sole, and separate use of the said *Ann Martin*; and also the last will and testament of the said *Ann*, duly executed, devising to certain persons therein named, the whole of her interest and estate in the said premises, to the exclusion of the complainants, or either of them.

A commission issued to take testimony, and interrogatories, were filed by the complainants, to be propounded to the defendant *John Diffenderffer*. In reply to these he stated—that the accounts heretofore filed by him in Chancery, will show the amount, and how, when, and from whom, he received the rents and proceeds of the estate of *Charles Rogers*, of which he was appointed trustee by the Chancellor, he has been at all times ready, and willing to account for, and pay over the balance which may be due, upon the said trust. He has at different times during the said trust made purchases of stock in various public institutions, by many of which he has lost large sums of money. He kept a separate, and distinct account of the

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rents received from said estate in his own books, though he did not make a separate deposite of them in bank, which could not be done, as the greater proportion of them was received in small sums, of ten, twenty, fifty, or one hundred dollars, and occasionally larger sums; that the moneys so received were deposited with his own in bank, and drawn for in the same way; and that he had at all times, a large cash balance in his favor in bank, for which he received no interest; and that he could, and would at all times have paid on demand, any thing due to said trust estate. All accounts made out by him, against the debtors of the estate, were in the name of the heirs of *Charles Rogers*, expecting to account with, and pay over to them the rents so received. The respondent had been advised, and believed, that the property belonged exclusively to his own children.

BLAND, Chancellor, (March term, 1828.)

After an attentive consideration of the will of the late *Charles Rogers*, upon the true construction of which, this controversy entirely rests, it is my opinion that he devised the property mentioned in the complainant's bill, to his daughters for life, with remainder to their children in fee simple, and upon the death of any one daughter without children, then her share was to go to the survivors, and their children. There is nothing in this will, which shows it to have been the intention of the testator, that his daughters, or their issue, should take an estate tail only. All four of his daughters are now dead, and two of them, *Ann* and *Mary*, have left no issue, consequently the property in the proceedings mentioned, must pass in two equal parts to the testator's grand children, the one-half part to the complainant, *Araminta*, as the daughter and sole heir of the late *Sarah*, and the other half part, to be equally divided, among *Amelia*, *Michael*, and *Charles R. Diffenderffer*, as the children and heirs of the late *Catharine*. The bill prays for a partition of the estate, and for an account of the rents and profits; these prayers will be granted. It was thereupon,

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(April 7th, 1828,) adjudged, that a commission issue to make partition accordingly, and the defendant was decreed to account, &c. It was further ordered, that the auditor state an account between the parties upon the proof then in the cause, or which might thereafter be introduced.

On the 8th of November, 1828, the auditor reported, that upon an examination of the proceedings it appears, that by an order passed on the 4th April, 1806, one *Samuel Vincent* was appointed trustee, to carry into effect the will of *Charles Rogers*; that he bonded, and acted as such, until 1814, when he resigned in favor of the defendant, *John Diffenderffer*. It does not appear that said *Diffenderffer* was ever formally appointed trustee, but he has been recognized as such by the court, in several orders, and as trustee, admits that he has received rents and profits to a large amount. It also appears that said *Vincent*, as trustee, returned an account of his receipts and disbursements, with his vouchers, which were referred to the auditor, and on the 23d December, 1818, sundry accounts were reported, but they yet remain undisposed of—with this report five accounts were filed.

Account (A) stated according to the instructions of the trustee's solicitor, charged him with all his admitted receipts, and allowed a commission thereon of ten per cent. also all his expenses, for taxes, repairs, &c. and the sum of \$2578,78, on the ground that an equal sum had been paid by the former trustee, to the other devisees, *Ann Martin*, *Mary Lee*, and *Sarah Bailey*, out of the rents and profits received by him, over and above their respective shares thereof.

Account (B) also stated in conformity with the defendant's instructions, differs from the first, only in charging the trustee with interest on the balance in his hands, at the filing of the bill; yearly rests are made, and interest allowed on the balance of principal in hand, at the end of each year to the time of taking the account.

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Account (C) stated according to complainant's instructions, disallows any commission to the trustee, and credits him only with his disbursements, for repairs, taxes, &c. Yearly rests are made, and interest charged on the *balances* in the trustee's hands, at the end of each year.

Account (D) is stated according to the auditor's views of the justice of the case, and like account (C) makes annual rests, charging interest on the *balances*, and allowing the trustee a commission of ten per cent. Exceptions were reciprocally filed by the parties to these accounts.

BLAND, Chancellor, at September term, 1829, passed the following decree :

This case standing ready for hearing on the exceptions to the auditor's report, and for final hearing on the decree to account, the solicitors of the parties were fully heard, and the proceedings read and considered. By the decree of the 7th of April, 1828, the extent of the interests of the respective parties was determined. A partition of the real estate was directed, which has been finally made accordingly ; and it was also ordered that the defendant, *John Diffenderffer*, render a full and true account of the rents and profits of the property in the proceedings mentioned, during the whole time the same has been, or may remain in his possession or under his control, and the case was sent to the auditor with directions to execute this decree to account, who has reported several statements accordingly. And the only matter now to be determined is, whether any, or which one of those statements is correct ; and the amount which the defendant, *John Diffenderffer*, ought to be decreed to pay to each one of the other parties to this suit. The bill states that the trustees named in the will of the late *Charles Rogers*, expressly refused to accept the trust, and are now dead, and that no trustee to carry it into effect had been appointed by any competent authority. But the defendant, *John Diffenderffer*, in his answer, has referred to the record of the case in this court, of *Sarah Rogers, et al.*

vs. Merryman and Smith, on a petition filed on the 27th of February, 1806, from which it appears that by a decree in that case, passed on the same day, *Nicholas Hopkins* was appointed a trustee, and on his declining to act, *Samuel Vincent* was appointed a trustee for the purpose of carrying the will into effect, on the 4th of April, 1806, who gave bond as such, and acted for some time. That after the death of *Sarah Rogers*, the widow, and after the death of two of the daughters of the testator, *Ann* and *Mary*, without issue, the trustee, *Vincent*, made a statement of his receipts and disbursements on oath, upon which the auditor reported two statements, one shewing the balance in the trustee's hands due to the legal representatives of *Charles Rogers*, viz : \$2889 47, and the other shewing the balance due to the representatives of *Sarah Rogers*, viz : \$227 83; which report and statements were, by an order of the 12th September, 1810, *confirmed*, and by a subsequent order of the 15th of December, in the same year, it is said, "that since the above order of the 12th of September, a report has been made by the trustee of the matters directed therein, by which it appears *that the debts of Charles Rogers had been paid, except an account of small consequence*, and the executors of *Sarah Rogers* have informed the court, that they wait for the sanction of the account rendered by the trustee—on this part of the case, the trustee is authorised and directed to pay to the executors of *Sarah Rogers* the sum reported due to her representatives, being \$227 83; as to the balance due to the heirs, the trustee is authorised and directed to pay one-fourth part thereof to *Sarah Bailey*, and to take her separate receipt therefor, according to the will of *Charles Rogers*, and one-fourth part to *Catharine Diffenderffer*, taking her separate receipt therefor. For the two other fourth parts, a further order will be given on the determination of the appeal in the suit mentioned in the report." Some years after which, the trustee, *Vincent*, in a letter dated on the 23d of November, 1814, addressed to the Chancellor, says, "I inform you of my resignation of the

trust in the estate of the late *Charles Rogers*, and have given it into the hands of Mr. *John Diffenderffer*, one of the heirs at law." There does not appear to have been any order passed on this resignation. But on an application, dated on the 20th of December following, made by *John Diffenderffer*, in which among other things, he says, "on examining the account of Mr. *Samuel Vincent*, trustee of the late *Charles Rogers*' estate, I find that he has charged a considerable sum of money to *Sarah Bailey*, *Ann Martin*, and *Mary Lee*; it appears to me by the will of the late *Charles Rogers*, they were not to receive, or entitled to any, till his debts were paid, which was completed on the 9th of April, 1808." Upon which, in an order of the 25th of March, 1815, it is said, "on the application of *John Diffenderffer*, who married one of the heirs, and on the resignation of *Samuel Vincent*, the trustee, the Chancellor has examined the former proceedings. Before any further order can be made, it will be necessary for him to be furnished with a transcript of the proceedings in the suits by *Mrs. Bailey* and *Mrs. Diffenderffer*, which were carried to the Court of Appeals, as mentioned in the report of *Samuel Vincent*." And by an order of the 8th of July, 1816, it is said—"It being represented that there is an error in the report, as to the suits in the Court of Appeals, mentioned in the order of the 25th of March, 1815, the auditor may proceed to examine the reports and vouchers, without waiting for the transcripts, and report thereon, giving notice to the former and present trustee." From all which I take it to have been finally settled by the judgment of the court, in the case of *Sarah Rogers and others vs. Merryman and Smith*, to which the widow and the four daughters of the late *Charles Rogers*, were all parties; first, that the debts of the testator had been all properly and correctly paid by the late trustee, *Vincent*, and that a share of the surplus, left after their payment, having been ordered to be paid to *Catharine Diffenderffer*, who had been a party to that suit before her marriage, is conclusive upon her and those

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claiming under her. Because so long as those orders of the 12th of September, and 15th of December, 1810, remain in full force, (and they are not now revisable in any way) she, nor any one claiming under her, cannot be permitted in any way to question the correctness of the manner in which the debts of the late *Charles Rogers* were paid, which has been so distinctly noticed, considered and confirmed by those judgments of the court. And in the next place, that it has been finally determined by the judgment of this court, as indicated by the orders of the 25th of March, 1815, and the 8th of July, 1816, that this defendant, *John Diffenderffer*, was to be considered thenceforward as the trustee, for the execution of the will of the late *Charles Rogers*; and that he had succeeded to that trust under the authority of this court, immediately after the resignation of *Samuel Vincent*, on the 23d of November, 1814. These positions which have been established in that case, appear to me to furnish a very satisfactory answer to the claim of the representatives of the late *Catharine*, to be substituted for, and allowed to take the place of the creditors of the late *Charles Rogers*, on the ground of their having been improperly paid with their funds, and upon that ground to have certain sums withheld, for their use, from the distribution now about to be made; and also to the objection that *John Diffenderffer* is here claiming only, as the natural guardian of his own children, and in opposition to the plaintiffs; since those proceedings shew that he stands here as a trustee, constituted by the authority of this court, for the benefit of all the devisees under the will of the late *Charles Rogers*.

But passing over all the proceedings and final adjudications in that case of *Rogers and others vs. Merryman and Smith*, let us return to the decree in this case of the 7th of April, 1828, by which, the defendant, *John Diffenderffer*, has been called upon to account for the rents and profits, for the whole time the property has been in his possession, or may remain in his possession. The statements reported by the auditor, and the exceptions of the parties to those state-

ments, present two distinct subjects for the consideration of the court. First—the claims and pretensions of the representatives of the late *Catharine*; and secondly, the allowances and liabilities of this defendant, *John Diffenderffer*. It has been urged that the debts of the late *Charles Rogers* were paid contrary to the directions of his will by the trustee, *Vincent*, out of rents and profits, which ought to have gone to the late *Catharine*; and consequently, that she, or her representatives, to the extent of the rents and profits to which she was entitled, and which have been so misapplied, ought now to be allowed to take the place of those creditors, as against those funds in the hands of this trustee, and which are now about to be distributed. This stand is taken upon the ground of substitution, and it can only be maintained by means of those principles, by which a surety, or one who has been placed in the condition of a surety, is allowed to take the place of the creditor against the principal debtor; or by the help of those principles by which securities or assets are marshalled, so as to satisfy all, or to leave the loss fall where it must rest, according to the positive rules of law, or by the aid of the general principles of equity, arising out of some fraud or injustice practiced or participated in by the plaintiffs, or those under whom they claim. It is a well settled general rule, that no one can be allowed to intrude himself upon another as his surety: and, therefore, if a man voluntarily pays the debt of another, without any agreement to that effect with the debtor, he cannot take the place of the creditor, or in any way recover the money so paid, of the debtor. Because the law does not permit one man thus officiously, and without solicitation, to intermeddle with the affairs of another. *Stokes vs. Lewis*, 1 T. R. 20. The only exception to this general rule is, where, on a bill of exchange being dishonored, a third person, not a party to it, may pay it for the honor of the drawer, or any of the endorsers—and the reason of allowing this exception is, that it induces the friends of the drawer or endorsers, to render

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them this service, and by that means preserve the honor of commerce, and the credit of the trader. *Chitty on Bills*, 164. But where one by express contract becomes bound as a surety for the payment of the debt of another, or as an insurer against loss, then, if the surety or insurer pays the whole debt, or reimburses the loser, he thereby entitles himself to demand a full assignment, or subrogation of all the securities of the creditor, or insured, and has a right in all respects, to be substituted for the creditor or insured, so as to enable him to obtain reimbursement from his principal. *Poth. Ob. p. 2, Ch. 6. Art. 4. Coop. Inst.* 612, 420. *Randall vs. Cochran*, 1 Ves. Sr. 99. This right of a surety to a certain extent, has been affirmed by our act of 1763, *ch. 23, sec. 8*. And this court has so entirely approved of the doctrine, as to allow a surety who had paid the whole purchase money, to have the benefit of the equitable lien of the vendor. *Melay vs. Cooper*, 13th Feb. 1804; and also to allow a surety on a custom-house bond, who had paid the whole debt, to take the place of the government, and thus to secure to himself the high and overruling preference, to which such a creditor is entitled. *Mickle vs. Taylor*, 1806. These principles in regard to those who stand properly in the relation to each other, of principal debtor and surety, have been extended for the benefit of an executor or administrator, who may have been induced through mistake, to pay the debts of the deceased, beyond the amount of the assets, which came to his hands, in which case, he has always been allowed in this court, as in *England*, to take the place of the creditor, and obtain reimbursement out of the real assets of the deceased. And if the debt so overpaid, was on a judgment against the deceased, operating as a subsisting lien upon his realty, the executor or administrator is permitted to take the place of such judgment creditor, and to have a preference in the distribution of the real assets over creditors of inferior grade. *Street vs. Cook*, 1809. *Robinson vs. Tonge*, 3 P. Will. 400.

This doctrine of substitution embraces only those cases where there is a principal debtor, and a surety by express

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contract; or where for the benefit of commerce a man is allowed voluntarily to place himself in the condition of a surety; or where he had by mistake, as in the case of an executor, made payment as if it had stood in that situation. Now before any of the principles upon this subject, can be brought to bear upon the case under consideration, it must appear that the plaintiffs, *Araminta*, or those under whom she claims, were the principal debtors, or that the trustee, *Vincent*, was the principal, and that *Catharine*, or those claiming under her were their sureties. And that those claiming under *Catharine*, were now here, asking to be reimbursed as such, out of the funds of their principal now in the hands of the court. But the assumption of any such statement would be in direct opposition to all the proofs in the case. *Vincent* was a trustee, appointed by this court for the benefit of all concerned in the estate of the late *Charles Rogers*, and if he misapplied the rents and profits, which came to his hands, he alone is responsible. If this court were now to make good to *Catharine's* representatives, any amount of the rents and profits, which had been misapplied by *Vincent* to their prejudice, out of the proportion of the funds now about to be distributed, to which the plaintiff, *Araminta*, is entitled, it would be in effect, to treat her as the principal debtor, for whose benefit among others, *Vincent* was not merely a trustee, subject only to the order of this court, but who was in fact her own proper agent; or it would be to consider *Araminta* as the surety of the trustee, *Vincent*. But there is nothing in the case to warrant the placing of *Araminta*, in any such condition of responsibility; and therefore the representatives of the late *Catharine* cannot sustain themselves, in the stand they have taken, by any principles derivable from the case of a principal debtor, and surety.

But the representatives of the late *Catharine* insist on having the securities, or these assets now about to be distributed, so marshalled, as to reimburse them to the amount of their share of the rents and profits, which had been misapplied by the former trustee, *Vincent*. The marshalling

of securities is only made where the debt is so secured, as to give the creditor the means of obtaining payment out of two funds, and other creditors can reach only one of them. In such case the court will compel the creditor who holds the more comprehensive security, to obtain payment as far as practicable, out of the fund which the other creditors cannot reach. So as to leave the other fund to be distributed among the creditors holding inferior securities. 1 *Mad. Ch.* 250. But there is no sort of analogy between the case of creditors, whose securities may be thus marshalled for the benefit of all, and without injury to any, and the case now under consideration. The plaintiff, *Araminta*, and the representatives of the late *Catharine*, stand precisely in the same situation; not as creditors seeking payment by way of preference, or otherwise, from the assets of a debtor; but claiming the distribution of a fund to which they are equally entitled. Marshalling of assets respects two different funds, and two different sets of parties, where one set can resort to either fund, the other to only one. As where there are real and personal assets, and judgment, and simple contract creditors, the real assets will be applied to the satisfaction of the judgment creditors, so as to leave the personalty to satisfy the debts due by simple contract. 1 *Mad. Ch.* 615. But here there is but one fund, and one set of claimants, who all deduce their titles from the same fountain. There is then nothing to be drawn from the principles of equity, in relation to the marshalling of securities, or of assets, which can in any manner aid the representatives of the late *Catharine*, in maintaining the stand they have taken. It has, however, been argued, that the amount misapplied by the trustee, *Vincent*, came to the use of those under whom *Araminta* claims, and therefore that it ought to be deducted from the share, now about to be awarded to her. If it has been shown that *Vincent* had fraudulently misapplied the funds, and that *Araminta*, or those under whom she claims had participated in the fraud; or that *Vincent* had paid money properly belonging to the

late *Catharine*, or her representatives, to *Araminta*, or those under whom she claims, who had received it, knowing it to be such, then there would have been a strong equitable ground, for deducting the amount so received, for the benefit of the representatives of the late *Catharine*, from the amount now about to be awarded to *Araminta*. But there is no proof whatever, of any fraud in *Vincent*, or of any participation in it by *Araminta*, or those under whom she claims, or of their having received any sum of money, knowing it to be the money of the late *Catharine*, or that it was money to which they were not justly entitled. Upon the whole, therefore, I am of opinion that no deduction whatever, can be made from the share to which the plaintiff, *Araminta*, is entitled, because of any misapplication of the rents and profits, in payment of the debts of the late *Charles Rogers*, or on account of any other misapplication of them by the former trustee, *Samuel Vincent*.

Having thus disposed of the claims of the representatives of the late *Catharine*, it only remains to determine the extent of the allowances and liabilities of the defendant, *John Diffenderffer*. It has been argued on his behalf, that he cannot be considered as a trustee, because he took possession of this property in no other character than as the natural guardian of his children. Admitting that he did so, he himself states, that he held their right under the will of their grand-father, and so far according to his own showing, he took possession of this property, in the character of a trustee; and as such he undertook at his peril, with the title deeds of his children before him, to claim and hold on their behalf, a much larger interest than that which belonged to them. He had thus confessedly assumed no higher character, than that of trustee for those who had the right, and now that it clearly appears, and has been determined by the decree of this court, that the whole right was not in his children, he certainly cannot be allowed to assume a new character, and to retain rents and profits, which he does not pretend to have received as his own, but for the

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use of others, who it has been determined have no right to them, and who cannot be allowed to receive them, or be held accountable for them. The decree of the 7th April, 1828, is however, conclusive upon this subject. Under that decree he has been called upon to account for the benefit of those, the extent of whose interests has been determined by it. But it appears from all the proceedings, that he has had in all respects, as complicated and troublesome an estate to deal with, as ever was committed to the management of an executor or administrator. His receipts have been very numerous, many of them small, and the collections and disbursements, it is evident, must have been attended with much trouble, and therefore, upon every principle of analogy, (apart from considering him as the successor of *Vincent*, to whom ten per cent. had been allowed,) I am of opinion that ten per cent. commission is a reasonable compensation, and I shall therefore ratify the statement of the auditor which makes that allowance.

It is contended on behalf of *John Diffenderffer*, that he is not chargeable with interest at all, while on the other hand, compound interest is claimed of him. Legal interest is the measure of damages, which the law allows in all cases for the detention of money, which the holder is made to pay, where he is in any default in not paying or applying the money in his hands, as he was bound to do. 2 *Fonb.* 423. The general rule is, however, that interest is not given upon interest; and therefore in this court when interest is allowed, it is computed by the auditor, from the time the money became due, up to the time of stating the account, and the decree is made for the whole amount with interest only on the principal sum, from that time till paid; by which mode of computation and decree, compound interest is excluded, and this appears to be the rule in *Virginia*. *Sheppards' Ex. vs. Stark, et ux.* 3 *Munf.* 41.

It has long been the established course of this court, according to the rule laid down by the Court of Appeals, in taking an account of rents and profits, to charge the party

with interest thereon, from the respective times they were received, *Davis vs. Walsh*, 2 *Harr. and Johns*. 329. In this case, one of the accounts of rents and profits has been stated with annual rests, at the instance of the plaintiffs, and the statement has not been objected to. It is more favorable to the defendant, *John Diffenderffer*, than to charge him with interest according to the rule of the court, from the time each sum was received, and therefore the computation of interest from the rest, will in this case be approved.

But it is objected, that interest should not be charged on the interest computed as a portion of the balances, at each of those rests. From all that has been said upon this subject, I take it that interest upon interest, or compound interest, may be charged in three kinds of cases; first, where with the knowledge and permission of the debtor, his whole debt, principal and interest, has been paid by a third person, or his surety, because as to such third person or surety, the interest is the same as the principal sum lent. 2 *Fonb.* 438. Secondly, where a trustee or holder of money has been directed, and undertakes to invest the sum placed in his hands in a way to make it productive, and fails or refuses to do so, he shall be charged with compound interest. As where a trustee who had been appointed by a decree of this court to make sale of certain real estate, was ordered to invest the proceeds of sale, then in his hands, in bank stock, and that he should in like manner invest the dividends arising from such investment; and on his failing and refusing to do so, the auditor was directed to state an account, charging him with interest, which he was ordered to bring into court, with interest on the interest so charged, until brought in, which order was, upon an appeal, affirmed. *Brewer vs. Hanson*, 1 *Harr. and Gill*, 12. And thirdly, where a trustee has received rents and profits, which he should have applied so as to be productive, or towards the maintenance of devisees, but failing or refusing to do so, retains and uses the money as his own, in a manner to derive profit from it, there also, he shall be charged with

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the whole profits he has made from the use of it, or on his failing clearly to shew what those profits were, it will be presumed, that the annual amount of interest has yielded him interest, and he shall be charged with interest thereon accordingly, considering each year's interest as an addition to the capital sum lent or withheld.

The equity of this last rule is founded upon the fact of the beneficial application of the money to the trustee's own use, in violation of his trust, and to the prejudice of the *cestui que trust*, and therefore it must appear, that the nature of the trust required the trustee to make the funds which came to his hands productive as soon, and to as large an amount, as practicable, in the mode prescribed, or in some other reasonable way at his discretion; or that he was required to apply them to the maintenance or education of the *cestui que trust*; and it must also appear that he not only failed to do so, but applied the money to his own use, or put it to hazard in a manner in which he did, or might have derived a profit from it. That the trustee was required to invest, or make a beneficial application of the money, may be shown by the terms in which the trust was created. But whether he has applied it to his own use or not, must be shown by proof. Whether the pecuniary ability of the trustee was such as to enable him to pay at any time when called on, is a matter of no consequence, as regards the question of interest. The making of a deposit of this money at a bank as his own, or making purchases with it, or using it in the course of his trade, has been deemed sufficient evidence of his deriving such a profit from it, as to authorise the court to charge him with interest upon each annual amount of interest. In the case under consideration, it very satisfactorily appears to have been the duty of the defendant, *John Diffenderffer*, to have applied the rents and profits received by him, for the benefit of all the devisees of the late *Charles Rogers*, and that instead of doing so, he deposited them as received, in bank as his own, drew them out, made purchases, and used them for his own use and

benefit exclusively. What advantages he derived from those rents and profits, thus mingled with his own money, from the time of their being deposited in bank, has not been shown, but such a course of management must have been very beneficial to himself, and greatly injurious to the devisees. Such a course of conduct by any one, standing as this defendant, *John Diffenderffer* did, bound to make the funds received by him productive, or constantly useful to those entitled to them, cannot be tolerated by this court. I am therefore of opinion, that he has been correctly charged with interest on the whole amount, including principal and interest, found to be in his hands at each rest. *Newton vs. Bennett*, 1 Bro. Ch. R. 359. *Roche vs. Hart*, 11 Ves. 59. *Raphael vs. Boehm*, Ib. 92. *Raphael vs. Boehm*, 13 Ves. 408. *Raphael vs. Boehm*, Ib. 591. *Ringgold vs. Ringgold*, 1 Harr. and Gill, 12. *State of Connecticut vs. Jackson*, 1 Johns. C. R. 14. *Schiefflin vs. Stewart*, Ib. 624.

Decreed, that statement (D) be ratified and confirmed, and the others rejected—and that *John Diffenderffer* pay unto the plaintiffs, and to each of the other parties, their costs.

From this decree both parties appealed to this court.

The cause came on to be argued upon the cross appeals before BUCHANAN, Ch. J., ARCHER, and DORSEY, J.

Dulany, for the appellant, (*Diffenderffer*) contended,

1. That under the circumstances of the case, *Diffenderffer* was not chargeable with compound interest,—he took possession of the property, believing it to belong to his wife and children. The will does not direct the trust fund to be invested for the purpose of accumulation; nor is there any express declaration that the property was given for the maintenance of the *cestui que trusts*. There are but two cases in which compound interest was ever charged. In the one, the charge was made upon the ground of fraud; in

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the other, upon the fact, that the trustee had used the funds for his own benefit, the rule being, that an executor or trustee shall make no profit to himself from the estate in his hands. In *Schiefflin vs. Stewart*, 1 Johns. C. R. 623, Chancellor Kent infers that compound interest has been charged in some *English* cases, because rests were taken, though such is not necessarily the case. A mere misapplication of funds by an executor, will not subject him to compound interest; he can only be so charged upon the ground of profit, and proof of such profits must be adduced. It is not sufficient that the executor is silent as to the extent of his profits; there must be actual proof that he has made profits equal to compound interest before he can be charged at that rate. This principle is recognised in *Ringgold vs. Ringgold*, 1 Harr. and Gill, 12—and also in *Tibbs vs. Carpenter*, 1 Madd. Rep. 162. 1 Chitty Dig. 548. *Earl of Hardwick vs. Vernon*, 14 Ves. 504. *Raphael vs. Boehm*, 13 Ves. 411. *Bates vs. Scales*, 12 Ib. 402. These cases also shew, that although the general rule is, that compound interest shall be charged where the trustee has used the fund, yet the courts always look to the peculiar circumstances of the case, and never but in one case, in *England*, has compound interest been actually decreed. The answers of *Diffenderffer* to complainant's interrogatories show, that he has not made a profit equal to compound interest; on the contrary, he invested the money in stocks, by which he lost; and he is also shown to have kept by him constantly, large cash balances. Although, therefore, the rule was, that investing in stocks, shall charge an executor with compound interest, upon the ground that he is thus presumed to have made such interest, yet in this case, there is abundant evidence to repel such a presumption. The courts do not charge compound interest as a punishment, but upon the ground of profit; and consequently, if profits equivalent to the interest are not made, the charge cannot be supported.

2. But *Diffenderffer* is not chargeable with interest at all. He took possession of the property, under the impression

that it belonged exclusively to his own children—his answer and the proofs, show this clearly. He was ignorant of the actual *cestui que trusts*, and the question is, did he use due diligence to inform himself correctly on the subject. The possession of the property was derived by him from *Vincent*, who had acted in the character of trustee, from 1806 to 1814, and who was consequently familiar with all the circumstances of the case. He was the very person therefore, to whom *Diffenderffer*, as a prudent man, should have applied for information on this subject, and his doing so, repels the idea of any fraud on his part. He was put into possession of this property by *Vincent*, as belonging exclusively to his wife and children. More than ordinary diligence to obtain accurate information in this respect, cannot be required. Other men, under similar circumstances, would have done as he did. Defendant was acting under the influence of an honest mistake, into which any man of ordinary prudence might have fallen, and therefore he should not be made to pay even simple interest, which is charged upon the ground of negligence. *Bruere vs. Pemberton*, 12 Ves. 390. 2 Chitty Dig. 1311. 3 Atk. 444. *Franklin vs. Green*, 2 Vern. 137. *Attorney General vs. Corporation of Exeter*, 2 Rus. 45. *Att'y General vs. Dean and Canons of Christ Church*, 2 Rus. 321. The money has been received under a mistake, and therefore does not carry interest, notwithstanding the infancy of the complainant—a claim for interest in such a case, even by an infant, is neither moral nor equitable. The rights of a minor, in a case like this, cannot be different from those of an adult; the error of the defendant is equally a protection against the claim for interest, whether the money received by him belongs in fact to an adult or a minor. All the defendant is bound to do in such a case, is to refund the money when the mistake is discovered. *Brisbane vs. Dacres*, 1 Serg. and Low. 50, 51. The Chancellor decides that *Diffenderffer* knew that he was a trustee, and if he had acted in that character throughout, then when the real parties were discovered, the fund must

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be preserved for them. Conduct which might be considered as negligent, in reference to a stranger, would not be so regarded with respect to a wife and children. The motives must be looked to. A husband may use the separate estate of his wife. If her dissent does not appear, he is not responsible for rents and profits. *Smith vs. Camberford*, 2 Ves, Jr. 698. *Methodist Esp. Ch. vs. Jacques*, 3 Johns. Ch. R. 78, 79. *Squire vs. Dean*, 4 Bro. Ch. R. 326. 1 Atk. 269. *Powell vs. Hankey and Cox*, 2 P. Wms. 82, 83. If the benefit of the trust fund is enjoyed by the *cestui que trust*, the trustee shall not pay interest; though he too, may derive an advantage from it, as in the case of a parent acting as trustee for his children.

3. The evidence shews that \$2578 77 of money, belonging to *Mrs. Diffenderffer*, was used by the former trustee to pay debts which were incumbrances on the shares of the other *cestui que trusts*, and consequently, the appellant in right of his wife, is entitled to a credit to that amount out of the funds of those *cesqui que trusts*, which have since come to his hands.

Johnson for the appellees, (*Winder* and wife.)

The question about which it is said *Diffenderffer* was mistaken, was, whether the whole interest in the devise to *Ann Martin* and *Mary Lee*, did not survive to *Mrs. Diffenderffer*. That question is not now open. The decree of March term, 1828, deciding differently, is not appealed from. All the facts were in the knowledge of *Diffenderffer*, as appears by his answer; and in 1815, when the trust devolved on him, he took it, as it was held by *Vincent*, and according to the will of *Rogers*. He took it avowedly for the benefit of the *cestui que trusts*—kept a separate account of the receipts, and professes at all times, to have been ready and willing to account for them. It is a principle of equity, that a party, who with knowledge, comes into the possession of an estate subject to a trust, takes as trustee, for the benefit of those who *actually* are the *cestui que*

trusts, and not those whom he may suppose to be. *Mech's Bank, vs. Seton*, 1 Peters' S. C. Rep. 309. *Diffenderffer's* situation cannot be better than *Vincent's* would have been. He claims, and is allowed a commission, as having been substituted for him. All the orders in the Court of Chancery from the resignation of *Vincent*, recognize *Diffenderffer* as the trustee, though no decree appointing him can be found. When the bill was filed in August, 1825, the defendant was in possession confessedly as trustee, when instead of a full and frank answer, manifesting a willingness to account, he sets up a title adverse to the complainants, and drives them to except to his answer. The answers show that every difficulty was interposed up to the date of the decree in 1828. It was proved on the part of the complainants, that *Diffenderffer* used the trust money as his own, and when he was called upon to say what use he had made of it, he refused to say, except that he had some stocks, without saying how much, upon which money was lost. But he will not give a detailed and full account, which he certainly could have done, if so disposed. Defendant during the whole time was a trader, and the money not used in buying stocks, was used in his trade, thus putting it to hazard, and pocketing himself the profits, whatever they may have been. When a merchant refuses to disclose his profits, he will be charged with compound interest, if he has used in his trade a fund held by him as trustee. All the cases shew, that a trustee cannot make a profit out of the trust fund, for the benefit of any but the *cestui que trust*. The case of *Ringgold vs. Ringgold*, 1 Harr. and Gill, 12, decides that beyond dispute. If the defence set up in the last answer is good against the complainants, it is good against the other *cestui que trusts*, whose rights the defendant had acknowledged before. The inference then is, not only that he made profits which he was unwilling to disclose, but that he designed, and still designs to keep them for his own benefit. A trustee who is ready and willing to account, and gives every information for that

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purpose, will be more leniently dealt with, than one whose conduct is the reverse. When a *cestui que trust*, calls on his trustee for the trust fund, he has not only a right to the fund itself, but likewise all the attending advantages. That portion of these rents and profits which belong to the complainant, *Araminta*, certainly was not used for her support, and it must therefore have been employed by the trustee in his trade, or invested in stocks for his own benefit. We have a right to call for an annual account, and to convert the profits of each year into capital at the end of the year. These profits are the property of the *cestui que trusts*; and to make the trustee pay only simple interest, would be to allow him to use a portion of their money without interest. If the defendant did not in fact use the money, but kept a separate account of it, he could have shown the fact, and having failed to do so, the inference is against him. *Schiefflin vs. Stewart*, 1 Johns. Rep. Ch. R. 620, 625. *Raphael vs. Boehm*, 11 Ves. 92. The fact, that the testator in the latter case had directed an accumulation, does not distinguish it from the case under argument, because the law makes it the duty of a trustee to do so without any such direction. The case of *Schiefflin vs. Stewart*, received the sanction of this court in *Ringgold and Ringgold*. In the latter case, the trustees were exonerated from the charge of compound interest, solely upon the ground, that it appeared in evidence that they had not made it. If the trustees had used the money in their business, there can be no doubt they would have been so charged. *Darne vs. Catlett*, 6 Harr. and Johns. 482. It is not pretended in this case that *Diffenderffer* did not use the fund, and use it beneficially for himself. The allowance of compound interest is to reach the supposed gains of the party, which can be got at in no other way. Deprive the court of this power and you render it powerless, because the *cestui que trust* can rarely ascertain the actual profits of the party. When a trustee admits he has made profits, but is unable to say how much, he shall be charged with

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compound interest. *Walker vs. Woodward*, 1 Russell, 107. *Stearns vs. Brown*, 1 Pick. 538. *Biglow's Dig.* 388.

2. The second question is, as to the liability of a trustee to pay simple interest upon trust money used by him. It is conceded that he is bound to pay those whom he knew to be *cestui que trusts*, and it would seem hard, that the unknown *cestui que trusts* should be in a worse situation. Now it is not pretended that *Diffenderffer* took possession of this property, believing it to be his own: he admits the contrary in his answer. A party who uses the money of another, is bound, as a matter of law to pay interest for it. *Newson vs. Douglass*, 7 Harr. and Johns. 417. *State use Kirk vs. Fridge*, 3 Gill and Johns. 103. It is said, however, that he is not bound to pay the other *cestui que trusts*, because they were his children, and he was charged with their support. If this were so, it is no reason for refusing interest to *Araminta*, with whose support he certainly was not burdened. But it is not law with respect to his own children, whose separate estate is not liable for their support, if the father is in a condition to support them. *Butler vs. Butler*, 3 Atk. 60.

3. With respect to the \$2578, to which it is said complainant is entitled to a credit, in right of his wife, as being so much of her money, applied to discharge debts which ought to have been paid out of the funds of the other *cestui que trusts*; it cannot be claimed upon the ground of an over-payment to those persons, because such a claim should be preferred against *Vincent*, the former trustee, or the parties who actually received it. In order to raise this question, two facts should distinctly appear—1st. That debts to that amount were in fact paid—and 2d, not only, that they were paid out of the profits of property specifically devised to *Mrs. Diffenderffer*, but also that the testator, *Charles Rogers*, did not leave personal property adequate to the payment of his debts. The claim is, to be substituted for the creditors who have been paid, and of course the rights of

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those creditors, and none other can be asserted. *Gists' adm'r vs. Cockey and Fendall*, 7 Harr. and Johns. 134.

Taney, (Att'y General U. S.) in reply.

1. There is no pretence of a wilful abuse of power, or negligence on the part of the trustee, nor that he ever intended the slightest injury or injustice to the *cestui que trusts*, whom he believed, were his wife and children. The direct purpose to injure persons standing towards him in such relations, cannot be presumed. He insisted that in the whole history of *English* and *American* law, but two cases could be found, in which compound interest had been actually charged. It has never, in a solitary instance, been done by this court, and a case like the present, free from fraud, negligence, or the imputation of improper motives, will hardly be selected, as the first one, for the application of so harsh a principle. The general rule is to charge simple interest. Compounding the interest is an exception, and the case of *Raphael vs. Boehm*, 11 Ves. 92, is in its very terms, an exception. On this point he referred to *Tibbs vs. Carpenter, et al.* 1st and 2d Madd. 162, 167.

2. As the defendant, for the first time, received notice of the present claim by the filing of the bill, he is not liable for even simple interest, under the circumstances of the case. The property was not taken possession of by him, as his own, nor did he enter as a general trustee of the trust fund, but as the specific trustee, for certain known and named *cestui que trusts*, for whose benefit alone, can he be considered as having received the property. The obligations of a trustee depend upon the character of his undertaking. In this case he undertook, and merely entered, for the use of those *cestui que trusts*, whose separate estate he supposed he was receiving from the general trustee. He could not dispute the title of those persons, nor could he divert from them to others, the income of that estate. The cases cited show how kindly the court will deal with a trustee who as acted ignorantly, but *bona fide*, particularly when

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the mistake has been committed by a person confided in by the Court of Chancery. Not having entered for himself, but for others, it cannot be presumed that he made profits; and in this view of the case, it is immaterial that the *cestui que trusts*, were his own children. He was as much bound to protect them as strangers. 1 *Chitty Dig.* 511. Where the trust is for the benefit of a wife, the husband will be presumed to apply it for her benefit, and with her consent, if he mixes the fund with his own, and uses it for the support of the family and in his business—unless objected to by the wife; the husband has a right to employ her trust fund for her benefit. 2 *Pierre Wms.* 82. It is not true, that in every case, a parent will not be allowed to apply a portion of his child's estate for his maintenance. 3 *Atk.* 60. And the permitting him to do so, is in harmony with the policy of our laws, which aims as far as practicable, to produce a pecuniary equality in members of the same family. The appellant, *Diffenderffer*, had a right so to apply the fund, and although he did not act formally as their guardian, yet as he asks a credit for no more than would be sufficient for their comfortable maintenance, a Court of Chancery will protect him.

3. The defendant is entitled to be reimbursed for the \$2578. It constituted a part of certain debts made by the will of *Rogers*, a lien on the estates of his daughters *Ann*, *Mary*, and *Sarah*. The property devised by the testator to *Mrs. Diffenderffer*, was not liable for any part of it. It was an incumbrance on the estates of the others—not merely on the income, but on the land itself. This money was paid by *Vincent*, out of the funds of *Mrs. Diffenderffer*, in his life-time; it was not a voluntary payment by her, but by the trustee, and by this appropriation of her money, a charge was removed from the estates of the other *cestui que trusts*, and the property thereby has devolved on those in remainder, disencumbered of the lien—they have the full benefit of the payment. This money having been paid from rents falling due in the life-time of *Mrs. Diffenderffer*,

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the present defendant, her husband, is entitled to a credit for it. As *Vincent's* accounts, settled in the Court of Chancery, show that this money was paid out of the trust fund, it is to be presumed not only that they were in fact so paid, but that evidence must have been offered to the Chancellor of a deficiency of personal assets. An account thus settled in the Court of Chancery, has the same *prima facie* effect, as a settlement by an administrator in the Orphans Court.

DORSEY, J., delivered the opinion of the court.

In disposing of the first point on which a reversal of the decree of the Chancellor has been urged, it is unnecessary for this court to consider, whether the credit insisted on by appellant, of \$2578 77, alleged to have been paid by the former trustee, (in satisfaction of the debts due by *Charles Rogers*,) out of that portion of the trust fund to which *Mrs. Diffenderffer* was entitled, ought not to have been discharged by the proceeds of the trust estate, on which those debts were conditionally a lien, accruing before the death of *Mrs. Bailey*: because it does not appear by the record before us, or any of the proceedings which it refers to, and makes evidence, that the personal estate of the testator was insufficient for the payment of his debts. It has been stated in the argument, that such insufficiency is established by the auditor's statement of the accounts, of the former trustee, made in the year 1818. But to these accounts, no such operation can be given; having never received the Chancellor's confirmation, they are no evidence of the facts they are relied on to prove. This credit therefore was properly rejected.

In discussing the question of interest, it has been strongly contended, that no such charge ought to be made, because *Diffenderffer* came into possession of the trust property, as the allotment of his wife, under a division of *Charles Rogers'* estate, made in pursuance of his last will and testament, by *Samuel Vincent*, the former trustee, without a knowledge of any other persons being entitled or claiming title to any part thereof, and that the first intima-

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tion of the kind which he received, was the filing of the bill in Chancery, which is now before us. What would be *Mr. Diffenderffer's* rights in such a state of facts, we are not required to determine. He stands not in that predicament before us. It is manifest that *Samuel Vincent* never did make any division under *Charles Rogers'* will, of the real estate devised to *Mrs. Lee*, *Mrs. Martin*, and *Mrs. Diffenderffer*, the only property whereof a division was directed;—that every thing done by *Hands*, and now relied on, as proof of such division, was to point out to *Diffenderffer*, at the time he took possession of the trust property, the forty feet lot on *Calvert* street, devised in severalty to *Mrs. Bailey*. That so far from being in utter ignorance of the rights, or claims of the appellees, until their bill was filed in 1825, he was fully and distinctly notified thereof, by the auditor's statements in 1818, made under his own eye, and as well, at his instance, as at that, of the former trustee. Had he then believed, as he now alleges, that his wife and children were entitled to the whole of the property confided to his charge, what would have been his course with regard to the auditor's accounts? It is so clearly pointed out both by his duty, and his interest, that what it would have been, cannot be the subject of a momentary doubt. He would have caused exceptions to be filed, and the rights of the parties interested to be definitively settled. His failure to have done this, cannot be otherwise regarded, than as a recognition of the title of the appellees. He has therefore, upon the grounds upon which he has asked it, no claims to lenity at the hands of this court.

Where trustees act *bona fide*, and with due diligence, they have always received the favor and protection of Courts of Equity; their acts have been regarded with the most indulgent consideration. But on the other hand, where they have betrayed their trust; where they have grossly violated their duty; where they have been guilty of unreasonable negligence, they forfeit all claims to the favor and protection of the court. Their acts are inspected with

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the severest scrutiny, and they are dealt with according to rules of strict, if not of rigorous justice. This course of proceeding, is productive of the most beneficial consequences, and is founded on the soundest principles of policy. It is the surest, perhaps the only means of securing the fidelity, vigilance, and integrity of those, to whose hands are committed the interests of the weakest, and most unprotected portion of the community.

It was held in *England*, even in the days of *Lord Hardwick*, that an executor was not chargeable with interest who had used for his own benefit, money belonging to the estate of his testator. Subsequently a more just and equitable principle was adopted. It was determined, that an executor or trustee ought not to derive any advantage to himself from the trust property; and that if he used it as his own, or was guilty of *crassa negligentia* in not paying it over to, or investing it for the benefit of the *cestui que trusts*, that he should be charged with the annual interest of *four per cent*; that being the established interest of the Court of Chancery. At a subsequent period, it being found that these abuses by fiduciary agents still continued, and that justice was not extended to *cestui que trusts*, by the rule already established, the court went a step further, and decided, that where an executor or trustee used the trust fund, and refused to render an account of the profits, that he should pay an interest of *five per cent.*; that being the greatest annual interest which the law allowed, and being the presumed amount of profits, to the whole of which, if ascertained, the *cestui que trust* was entitled. At a still later period, a decree was passed, (sanctioned by the opinion of at least three Lord Chancellors) in *Raphael vs. Boehm*, reported in 11 and 13 *Ves.*, by which not only *five per cent.* was allowed, but compound interest also, against an executor who had neglected, as directed by the will, to invest money with the interest accruing thereon by way of accumulation, for the benefit of the children of the testator. 'Tis true, that the decision in that case, was made as depending on the pecu-

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liar provisions of the will, under which the executor acted. But it is equally true, that there was nothing in that will enjoined on the executor, which the law does not impose on him as a duty, without any testamentary injunction on the subject, where money belonging to the deceased's estate unnecessarily, and for an unreasonable time, remains in his hands. And it requires more than an ordinary degree of astuteness, to discern the distinction in a moral point of view, or in the eyes of a court of conscience, between the acts of him, who violates the duties required of him by a testament or deed, and him who in regard to the same subject matter, violates the same duties imperatively imposed on him by the established principles of law. But the appellant here, is not even entitled to the benefit of this distinction, if any there be, because, like the executor in *Raphael vs. Boehm*, his duties are enjoined on him by the same authority under which he derives his powers.

In what has been said respecting the legal obligation of investment by executors or trustees, in whose hands large sums have, without any reasonable excuse therefor, been suffered to remain, we do not mean to say, that compound interest is the indemnity to be made for such negligence. The current of *English* decisions is against it, and the question is not now before us for adjudication. It is hardly necessary to say that *Mr. Diffenderffer*, by his own acts, and the recognition of his agency by the Court of Chancery, stands precisely in the same attitude in which he would have stood, had he been a trustee regularly constituted by a decree of that court. The doctrine of *Raphael vs. Boehm* has been elaborately investigated, and learnedly discussed in *New York*, by that most distinguished jurist, Chancellor *Kent*, and has been adopted to its fullest extent in the case of *Schiefflin vs. Stewart*, 1 *Johns. Ch. R.* 620, where no directions for investment or accumulation are to be found. The allowance of compound interest prevails in like manner in *South Carolina*, as will appear by *Wright vs. Wright*, 2 *McCord*, 185, where two cases are referred

to, as having previously decided the same question, viz: *Bowles and wife vs. Drayton*, 1 *Desaus*, 489, and *Edwards vs. McMorris*, *Harper's Eq. Rep.* 224. In *Massachusetts* also, the computation of interest is made on the same principles, as is shown by the case of *Robbins vs. Hayward*, 1 *Pick. Rep.* 528, in which, where large sums of money had come into the hands of a guardian, and no account had been rendered for many years, there being rents from real estate, and income from public stocks periodically received, it was ordered that an account be settled with a rest for every year, including principal and interest; and the balance thus struck, carried forward, to be again on interest, whenever the sum should be so large, that a trustee, acting faithfully and discreetly, would put that sum into a productive state.

Do the facts in this cause present *Mr. Diffenderffer's* conduct as a trustee, in a more favorable aspect, than that in which appeared the conduct of the several defendants in the authorities referred to? Such a comparison he can have no motive to invite. In *Raphael vs. Boehm*, the testator died in 1791. The bill was filed against his executor in 1794, so that the funds were in the executor's hands about three years; and it is not shown that he ever used them for his own benefit. Within three months after the filing of the bill against him, he obtained an order for that purpose, and brought into the Court of Chancery the principal part of the money he had received; and in his answer, after alleging payment of the debts of the deceased, and for the maintenance and education of his wards, he stated that he was ready to pay the balance, and interest for the testator's money, which he had from time to time in his hands, as the court should direct. Contrast this with the conduct of *Mr. Diffenderffer*. He assumed the trust in 1815, and from that time until 1828, he had from time to time, every year received large sums of money, which he continually employed in trade and speculation. He filed more than one defective answer, withholding from the complainants the dis-

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covery they sought. He claimed the whole trust fund as belonging to his wife and children, and endeavored by all the means in his power, to stifle the inquiry as to the use he had made of the money received, or the profits which had accrued from its use. After the present litigation had continued nearly three years, he filed a supplemental answer, setting up an unfounded stale claim in a stranger, to one-third of the trust fund; thus seeking to defeat the just rights not only of the appellees, but of his own children. From the year 1815 to the present day, it does not appear that he ever paid, or offered to pay, to any of the *cestui que trusts*, one dollar of the \$35,373 48, which he received before the 2d of August, 1828, being the income of the original trust estate. In *Schiefflin vs. Stewart*, the executor himself filed the bill, praying that his accounts might be settled, and stating that he was desirous of paying over the residue to the children of the deceased, or their guardian. It cannot be necessary to draw the strong lines of discrimination between the case at bar, and the cases cited, nor further to prosecute this unpleasant comparison. The interests of the appellant certainly do not urge it.

Is it unjust or unlawful to charge the appellant with compound interest, under the peculiar circumstances of this case? It is a rule of equity, founded as well on principles of natural justice, as of sound policy, and now too well settled to be controverted, that profits made by an executor, or trustee, by the use of the trust fund, belong to the *cestui que trust*; and that if an account of such profits be withheld, that interest shall be allowed as an equivalent therefor. What was the trust fund used by *Diffenderffer*, in the year 1815? The amount received from the trust estate during that year. Of what consisted the trust fund used in 1816? The receipts from the trust estate in 1815 and 1816, and the profits made in 1815. Can a reason be assigned why these profits, thus used by the trustee as so much capital, should not bear interest in the same manner, as any other part of the trust fund enjoyed in the same way? Ought the trustee

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to have the beneficial use of these profits for sixteen years, and pay no interest therefor? This advantage he will unquestionably have enjoyed, if charged with the payment of simple interest only. Justice cannot be administered to the *cestui que trust*, their clear equitable rights cannot be sustained, but by allowing them interest on their profits used by the trustee. And this is the compound interest for which, under the decree of the Chancellor, the trustee hath been made answerable. If the appellant be let off with the payment of simple interest, it would be offering to fiduciaries, a premium for infidelity. It would in effect be a decree of this court, giving to the trustee several thousand dollars, in addition to his commissions, of the property of the *cestui que trusts*, as a reward of any thing, rather than a faithful execution of the duties of his trust.

It may also be remarked, that the established interest of the Court of Chancery in *Maryland*, is six per cent.; in allowing compound interest thereon, (unless the delinquency be of at least twelve years continuance, nay even in the case now before us,) the same additional relief is not obtained by the *cestui que trust*, that is granted in the familiar cases to be found in the modern chancery reports of *England*, where the inflated interest of five per cent. is exacted of executors or trustees, who abuse their trusts. And we by no means go to the length to which *Raphael vs. Boehm* has been carried, where five per cent. has been charged, and interest compounded at the same rate. If, in no case, compound interest is to be exacted, you uproot the settled principle of equity, that all gains from the use of the trust fund shall inure to the benefit of the *cestui que trust*; and you present the strange anomaly in the law, that every shade of delinquency, corruption or misconduct of a trustee, no matter how various its consequences may be to the interests of the *cestui que trust*, is visited with the same measure of retribution. If in *England* and *New York*, where trustees are agents, serving gratuitously, it be deemed equitable for some delinquencies to subject them to the payment

of compound interest, ought it to be looked on as a measure of severity, that the same rule should prevail in *Maryland*, where trustees, by way of commission, are liberally compensated for all the services they render? But this question of compound interest is not now, for the first time, submitted to the consideration of this tribunal. In *Darne vs. Catlett*, 6 *Harr. and Johns.* 482, where the decree of the Chancellor had given compound interest, this court said, that they could not “concur with the Chancellor in the allowance of compound interest. It is neither charged nor proved, that the executors had appropriated any of the bequest, or of the proceeds thereof, to their own use, or employed them in their own business, or in any way made any profit or gain from them, or in any manner subjected them to hazard.” The necessary inference from which is, that if these facts had appeared, it would have been deemed a fit case for compound interest. The principle is still more distinctly affirmed in *Ringgold vs. Ringgold*, 1 *Harr. and Gill*, 79, 80, where this court thus express themselves: “Where the trustee is directed to invest funds, and to re-invest the dividends; or in other words, where the trust directs an accumulation, and the trustee has used the funds, compound interest will be allowed, as was done in the case of *Raphael vs. Boehm*, 11 *Ves.* 92, 108, 109, and *S. C.* 13 *Ves.* 407, 590—or where he has used the trust money, or employed it in his trade or business, he shall be charged in the same manner, as was decreed in *Schiefflin vs. Stewart and others*, 1 *Johns. Ch. R.* 620. The grounds of this allowance, as is apparent from these cases, is founded on the gain or presumed gain of the trustees, and that the *cestui que trust* may be indemnified by the efforts of the court in this way, to reach their profits or presumed profits.” Upon principle, therefore, as well as authority, so far as the appeal of the appellant is concerned, we affirm the decree of the Chancellor.

On the appeal taken in this case by *Winder and wife*, we cannot sustain the decree of the Chancellor. It gives to

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the trustee a commission of ten per cent., which is the full allowance that ought to have been made to him, had his conduct been marked by a strict performance of the duties he had assumed. But this is very far from being the posture in which he appears before us. It is the duty of a Court of Equity, in the distribution of its favors, to discriminate between those who violate their duty, and abuse their trust, and those who perform it with skill and fidelity. To the latter a full commission is cheerfully bestowed; to the former half that amount is reluctantly granted. *Mr. Diffenderffer* having kept full and fair accounts of his receipts and expenditures, and in that respect faithfully discharged his duty as trustee, we do not think he has forfeited all claim to commissions, as he otherwise would have done. We reverse, therefore, the decree of the Chancellor on the appeal by *Winder and wife*, on the ground that but five, instead of ten per cent. commission, ought to have been allowed to the trustee.

Upon this reversal, we are called on to exercise, as it were, an original equity jurisdiction—to give that decree on the record before us, which the Chancellor ought to have given. Whilst relieving the appellant, we must do justice to the appellee. If, therefore, by the decision of the Chancery Court, any injustice has been done to him, in remodelling the decree we must extend to him that relief, on which his equities authorise him to insist. That an error to the prejudice of the appellee, *John Diffenderffer*, has been inadvertently committed in Chancery, is manifest. He has been decreed to pay two-thirds of the rents and profits of the trust fund to his children, from the 16th of January, 1815, till 1828, whereas their rights first accrued to them on the death of their mother, on the 30th of June, 1818. If it be asked, why on this ground the decree of the Court of Chancery was not reversed on the appeal of *John Diffenderffer*? The answer is obvious; his not having made it a matter of exception to the auditor's statements, the act of

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1825 precluded him from suggesting it as an error, on his appeal to this court.

That this court may pass a final decree in the cause, we appoint and direct the auditor of the Court of Chancery to state a new account, upon the basis of this opinion, that the expense of such audit be paid by the appellants; and that the same, as a part of their costs, on their appeal, be taxed by the clerk of this court.

DECREE REVERSED.

BUCHANAN, Ch. J., dissented from the opinion of the court, in relation to the liability of the appellant, (*Differdfer*) for compound interest.

KLINEFELTER'S LESSEE vs. SARAH CAREY.—*December,*
1831.

In 1818, the tenant in possession failing to appear after notice, to an action of Ejectment, judgment was rendered against the casual ejector. The plaintiff was then put into possession, under a writ of *habere facias* regularly executed. In 1827, C, claiming title to the land, by petition, in which the tenant in possession united, prayed the *County Court* to set aside the judgment, restore the possession, and admit the petitioners to defend the action, upon the usual terms; this being granted, the defendants afterwards moved the court, to stay all proceedings, upon payment to the lessor, the rent due to him at the time of bringing the suit and the costs. This motion being also granted, the plaintiff appealed. HELD, that the *County Court* erred in striking out the judgment, which was entered upon the tenants failing to appear, after such a lapse of time, and that the lessor of the plaintiff was entitled to a writ of restitution.

Wherever a judgment in ejectment has been stricken out upon the tenants failure to appear, it has always been one of recent date. It has generally been, where the period had been too short for improvements of importance to have been made in the intermediate time, and where no trial had been lost.

Klinefelter's Lessee vs. Carey.—1831.

APPEAL from *Baltimore County Court*.

On the 9th of September, 1818, *Michael Klinefelter's* lessee, (the present appellant,) brought an Ejectment for a tract, or parcel of land in *Baltimore County*, called Lot No. 191, against one *Solomon Richards*, the tenant in possession.

The following statement of the case is taken from the opinion of the Judge, who pronounced the decision of this court.

This action of Ejectment was instituted to September term, 1818, when the tenant in possession failing to appear, judgment was rendered against the *casual ejector*, and a writ of *habere facias possessionem* issued returnable to March term, 1819, when the sheriff returned that he had delivered possession, on the 26th of November, 1818. About nine years afterwards, (to wit, November 23, 1827,) a petition was filed by *Sarah Carey*, and the tenant in possession, to set aside the judgment against the *casual ejector*, and to be permitted to appear to, and defend the said action, they making the usual confession of lease, entry, and ouster, and that a writ of restitution might issue, to restore the possession to the tenant in possession, and that a rule might be laid upon the lessor of the plaintiff, to shew cause why the said motion should not be granted. Upon this petition the court ordered the judgment to be set aside, the cause to be brought up by regular continuances, and a writ of restitution to issue to restore the possession to *Sarah Carey*, who claimed the title, and that she be admitted as defendant. To declaration filed against her, *Sarah Carey*, put in the plea of not guilty; and afterwards, on the 8th day of January, 1829, moved the court, that the proceedings in the cause might be stayed, upon payment to the lessor the rent due to him, at the time of the suit brought, and the costs of suit. On the 21st day of February, 1829, the court, "ordered, that the proceedings in this cause be stayed, upon the defendants paying to the lessor of the plaintiff,

all rent in arrear, which accrued from the time of the conveyance of the reversionary right to him, up to the day of the delivery of possession of the premises to the lessor." Whereupon the plaintiff prayed an appeal to this court.

The cause was argued before BUCHANAN, Ch. J., MARTIN, STEPHEN, and DORSEY, J.

Samuel I. Donaldson for the appellant, contended,

1. The motion to set aside the judgment in this case was too late in point of time. Whenever the acquiescence is so long, that the party may be presumed to have submitted to the judgment complained of, the court will not disturb it. No judgment from which an appeal will not lie, can be considered a recent one. If an opportunity of trial has been lost by the delay, the judgment must stand, even though the motion to strike out, be founded upon an affidavit of merits. *West vs. Davis*, 7 *East*. 363. *Harris vs. Masters*, 9 *Serg. and Low*. 158. *Aslin vs. Parkin*, 2 *Burr*. 665, 756. *Jackson vs. Stiles*, 4 *Johns. Rep*. 489. *Spurrier vs. Yieldhall*, 2 *Harr. and McHen*. 173. *Gover vs. Cooley*, 1 *Harr. and Gill*, 7. *Jackson vs. Stiles*, 1 *Caines*, 505. *Munnikuyson vs. Dorsett*, 2 *Harr. and Gill*, 374. *Dand vs. Barnes*, 1 *Serg. and Low*. 291. *Fletcher vs. Wells*. 1 *Ib*. 352. *Stat*. 4, *Geo*. 2, *ch*. 28, *sec*. 2.

2. The notice given to the tenant in possession in this case, was sufficient, and his failure to appear at the first term of the court thereafter, was *laches*, and fatal to the present application. *Adams on Eject*. 209, 210, 216. *Ledger vs. Roe*, 3 *Taunt*. 505. *Good Title vs. Bad Title*, 4 *Ib*. 820. *Jackson vs. Wilson*, 3 *Johns. Cases*, 295. *Jackson vs. Demarest*, 2 *Caine's Rep*. 381.

McMahon, for the appellee, insisted, that the record did not present a fit case for an appeal. Where courts have the power to strike out their judgments, an application for that purpose, is to their discretion, and if the application is suc-

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cessful or otherwise, an appeal will not lie. *Woods vs. Young*, 4 Cranch, 137. *Marine Insurance Co. vs. Hodgson*, 6 Ib. 217. *Welch vs. Mandeville*, 7 Ib. 152. *Hawkins vs. Jackson*, 6 Harr. and Johns. 151, (a) *Adams*, 225, 240. The appellee has been guilty of no laches which could preclude her from the right of appearing and defending the ejectment. She had no notice of the proceeding, or at least there is no evidence of notice. The court is not at liberty to infer notice from circumstances, when positive proof might have been adduced. *Klinefelter's* affidavit, or the affidavit of *Richards*, could certainly have been procured, if notice in fact existed. But suppose she had notice, mere delay is not laches. *Dand vs. Barnes*, 1 Serg. and Low. 291. *Fletcher vs. Wells*, 352. The plaintiff's condition in this case, is not worse, but better, than if he had not been in possession; for having enjoyed that possession for nine years, he has been reimbursed for his rent. If the appellee here was to bring her ejectment, she would not be estopped from recovering, by the delay which has taken place, and therefore to prevent circuitry of action, the proceedings should be set aside. *Hitchings vs. Lewis*, 1 Burr. 614. *Jackson vs. Demarest*, 2 Caines, 381. 3 Johns. Rep. 226. *Jackson vs. Elsworth*, 20 Ib. 180.

STEPHEN, J., delivered the opinion of the court.

After making the statement before set forth, he said, the question which presents itself to this court is, whether the court below were warranted in striking out the judgment, which was entered upon the tenants failing to appear, after such a lapse of time, and permitting the proceedings to take place, which were subsequently adopted.

In all our researches, we have not been able to discover a single decision or precedent, which would countenance or sanction such a procedure. Wherever a judgment in ejectment has been stricken out, upon the tenants failing to appear, it has always been one of recent date, and never of such long standing as the one involved in the present con-

troversy. It has generally been where the period had been too short, for improvements of importance to have been made, in the intermediate time, and where, as the books say, no trial had been lost.

If this case were to be governed by a rule adopted by analogy to that prescribed by the Legislature, for the limitation of appeals, the proceeding would be clearly unwarrantable. But it is not deemed necessary to rely upon that legislative enactment as the basis of our decision, as it may be fully sustained by considerations drawn from other sources. It is true, that actions of ejectment, being creatures of their own, courts of justice will lend a more favorable ear to applications of this nature, than in other cases; but still there are certain limits prescribed by reason, and the policy of the law, which ought not to be transcended. In *Jackson vs. Stiles*, 1 *Caine's Rep.* 505, the court say,—“In ejectment, as it is the creature of the courts, every thing will be done to promote the justice of the case, according to right, and the court will go further to protect the possession, when it can be done without injury to the plaintiff's claim, than it is willing in other cases to proceed. As therefore, there was a full knowledge in October last, of an intention to make this application, and the transactions are all of a recent date, we are of opinion that the default entered against the casual ejector, the judgment thereon, and the writ of possession sued out, be set aside, and a writ of restitution issue, on payment of costs.” So in *Jackson vs. Stiles*, 4 *Johns. Rep.* 490, the court also say: “The excuse given by the attorney of the defendant, for not entering into the consent rule in season, is frivolous and inadmissible. But here the tenant swears to merits, and as no trial has been lost, we will not let the possession be changed in an action of ejectment, without an opportunity to the defendant to defend it. It was said in the case of *Jackson ex. Dem. Rosekraus vs. Stiles*, 1 *Caines*, 503, that the court would set aside a default, to protect the possession of the tenant, in an action of ejectment, when they would not do

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it in any other action. We therefore grant the motion, on payment of costs, and on the tenants entering into the consent rule, and pleading within ten days, so that the cause may be tried at the ensuing circuit in *Ulster*." In *Runn. Ejec.* 120, the law is stated to be as follows: "If a judgment be signed against the casual ejector, and it be made appear that no declaration was rightly served, the court will set it aside. Also, where a judgment has been obtained against the casual ejector, but no trial lost, the court will, on payment of costs, and the tenants entering into the common rule to confess lease, &c., set aside such judgment as in other actions; and not put the tenant to the charge and hazard of recovering back his possession by another action." So in *1st Richardson's Prac.* 506, the law is laid down to be as follows: "Where judgment is obtained against the casual ejector, and a trial is not lost, the court will, on payment of costs, and entering into the common rule for confessing lease, entry and ouster, set aside such judgment, as in other actions, and not put the tenant to the charge and hazard of recovering back his possession by another action." In *Spurrier's Lessee vs. Yeldhall*, 2 *Harr. and McHen.* 173, the case was as follows: "An action of ejectment was brought to *May* term, 1785, and at *May* term, 1786, a judgment was confessed for possession and costs. A writ of *habere facias possessionem* issued to *October* term, 1786, and the sheriff returned, "possession delivered." At *May* term, 1787, it was ruled by the court, "that *Rezin Spurrier* show cause, this term, why the writ of possession, and judgment entered at *May* term, 1786, for his lessee, and *Benjamin Yeldhall*, should not be set aside." And on the 21st of *May*, in the same term, the following entry was made: "It appearing to the court, by the affidavit of *Upton Scott*, that at the time of commencing the suit of *Rezin Spurrier's* lessee, against *Benjamin Yeldhall*, the said *Upton Scott* was in possession of nine and a quarter acres of the land, for which the ejectment was brought, and that no copy of the declaration in ejectment was served upon him,

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and that the said *Scott* claims the said nine and a quarter acres of land, as tenant in fee simple, and a rule having been served on the plaintiff to show cause, &c., and the said *Upton Scott* now praying that the judgment and execution be set aside, as to the said nine and a quarter acres, and that he be admitted defendant in this cause, as to the said acres: *Ordered*, that the judgment be struck out, as to the said nine and a quarter acres claimed by the said *Upton Scott*." By all these cases the principle seems to be affirmed, that it is only where the judgment is a recent one, that the court will interfere for the purpose of setting it aside, to enable the tenant to appear and defend his possession. But no case it is believed can be found, where a judgment has been stricken out, after such a lapse of time, and under the circumstances existing in the present case.

JUDGMENT REVERSED, and a writ of Restitution awarded, to restore the possession to the appellant.

PATRICK L. WATTS vs. JESSE GARRETT.—December, 1831.

In an action of a replevin for a negro slave, the plaintiff proposed to prove by his former guardian, that the negro in controversy was the plaintiff's property; but it appearing, that this negro constituted a part of the plaintiff's estate during his minority, and during one period thereof had been in the witness's possession, the *County Court* held the witness incompetent. Upon appeal this was reversed.

When the competency of a witness is objected to on the ground of interest, the interest should appear. It should be seen by the court, in order that it may be able to determine its character, and whether it be such as to amount to a disqualification. It should not rest in mere conjecture or speculation, but should be certain and direct, and not possible only. Where the interest is of a doubtful character, the objection goes to the credit, and not the competency of the witness.

APPEAL from *Baltimore* County Court.

On the 9th of July, 1828, the appellant brought *Replevin*, against the appellee, to recover a negro slave, alleged to be the property of the appellant. The defendant pleaded, "*non cepit*" property in himself, and limitations, to which they were replications, and issues were joined.

1. At the trial the plaintiff offered *Margaret Willis* as a witness, by whom he proposed to prove, that the negro in controversy was his property ; but it being in proof, that the witness was guardian of the plaintiff, and that this negro was, during the plaintiff's minority, the property of the plaintiff, (which minority ended on the 1st September, 1827,) and during part of that minority in witness's possession, the defendant objected to her competency ; and the court, (ARCHER, Ch. J., and KELL, A. J.,) sustained the objection. The plaintiff excepted, and the verdict and judgment being against him, he appealed to the Court of Appeals.

The case was argued before BUCHANAN, Ch. J., EARLE, and DORSEY, J.

C. Birnie, Jr. and Gill, for the appellant, who cited, *Stark. Ev.* 744, 1729. 1798, ch. 101, sub-ch. 12, sec. 15. *Stewart vs. Kip*, 5 Johns. 256. *Abrahams vs. Bunn*, 4 Burr. 2255. *Mockbee vs. Gardner*, 2 Harr. and Gill, 176.

Belt, for the appellee, cited, *Act* 1798, ch. 101, sub-ch. 12. 2 *Stark on Ev.* 746, 747. *Hungerford vs. Bourne*, 3 Gill and Johns. 137.

BUCHANAN, Ch. J., delivered the opinion of the court.

It does not appear in the bill of exceptions, and looking to the record only we are left to conjecture, on what ground the objection to the competency of the witness offered on the part of the plaintiff was made and sustained, and her testimony rejected by the court. But we are informed

by counsel in argument, that she was interested in the event of the suit, and therefore incompetent. If it appeared, that the effect of her testimony would have been to rid herself of a responsibility, and to cast it upon the defendant, the objection to her competency was well taken. But we do not perceive, that she had any direct interest in the event of the suit, sufficient to disqualify her. If she had any such interest, what was it? The mere circumstance that she had been the guardian of the plaintiff, during his minority, (then passed) surely was not of itself sufficient; but it should have appeared, that she had incurred a liability during her guardianship, in respect of the property in controversy, which she might by her testimony have shifted to the defendant. But it is difficult to discover, what liability she could, by her testimony, have shaken from herself, and cast upon the defendant. The possession which it appears she had of the negro, during a part of the minority of the plaintiff, may have subjected her to a responsibility for the hire, or annual value of him; but that forms no part of the matter in controversy, and could not have been transferred to the defendant, by any testimony she could have given. On the contrary, being called to prove that the negro was the property of the plaintiff; if she did receive the hire or annual value of him, during the plaintiff's minority, and had not properly accounted for it, or it was lost by any culpable negligence, or inattention to her duty, the very evidence she was called to give, that he was the property of the plaintiff, was evidence going to fix her liability for such hire, or annual value, and so far against her own interest. When the competency of a witness is objected to, on the ground of interest, the interest should appear. It should be seen by the court, in order that it may be enabled to determine its character, and whether it be such, as to amount to a disqualification. It should not rest in mere conjecture or speculation, but should be shown to exist, and to be certain and direct, and not possible only. For the bare possibility of an action being brought against the

witness, furnishes no objection to his competency. And where the interest is of a doubtful character, the objection goes to the credit, and not to the competency of the witness.

In this case, we do not perceive that the witness offered by the plaintiff, was shown to have had any certain and immediate interest, one way or the other. She was legally entitled to the possession of the property, during the minority of the plaintiff, in her character of guardian, if it belonged to him; and for any thing appearing to us, may have surrendered up the possession, when he attained his full age. But it has been suggested by counsel, that she may have abused her trust as guardian, and improperly parted with that possession during the minority of the plaintiff, or by some misconduct, have incurred a liability to be sued, for the value of the property, if the plaintiff should not recover against the defendant, in this action, and was therefore interested in sustaining the suit by her testimony.

It may be possible, but no such liability or misconduct has been shown; and we are not bound, or at liberty, merely for the purpose of rejecting her testimony, to presume that she did violate her duty; but rather, nothing appearing to the contrary, that she faithfully discharged it, and delivered the possession of the property to the plaintiff, when he became entitled to receive it. And the bare possibility that she may have rendered herself liable to an action, is not, we think, an objection to her competency. It is not like the case of *Hungerford vs. Bourne*, decided by this court, which has been referred to. In that case there was a clear and certain liability on the part of the witness, who had a manifest interest in sustaining the suit; whereas here, no liability is shown to exist.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

WILLIAM HANSON vs. JOHN BARNES' LESSEE.—December, 1831.

It is a general principle, that where a new person is to be benefitted, or charged by the execution of a judgment, there ought to be a *scire facias* to make him a party; but this principle does not apply to a case, where the new party becomes interested after the process is in the hands of the officer for execution.

The death of a defendant before a levy on a *fi. fa.*, in the hands of the sheriff prior to such death, does not render a *sci. fa.* against the heirs and *terre tenants* necessary; the sale under a *fi. fa.* thus issued and levied, passes title to the purchaser.

The writ of *fi. fa.* requires no order or action of the court, to give the plaintiff the fruits of his execution. These are reaped when the sheriff discharges his duty under the process.

Judicial writs do not in general abate by the death of the party.

Since the statute of 5 *Geo. 2, chap. 7*, lands have not been considered as a secondary fund in the hands of the debtor for the payment of debts; but they are equally liable with his personalty. The judgment creditor may, at his election, seize either, unless under peculiar circumstances of equity, he shall be restrained from exercising his election to the prejudice of an alienee, devisee, or heir.

After the death of a debtor, lands are only secondarily liable, but this must be taken with the qualification, that prior to his death, they had not become liable to be affected by an execution.

Parol evidence is admissible to establish the date of the delivery of an execution to the sheriff, where no endorsement of the time was made on the writ, as the statute demands of that officer.

Neither an endorsement of the time of the delivery of a writ of *fi. fa.* to the sheriff, nor evidence of that fact, is necessary in making title to lands purchased under that writ—Nor is it necessary as to personal property, except as against purchasers.

The lien upon lands is from the rendition of the judgment, and the right to execution of lands in the tenure of the heir, grows out of the statute 5 *Geo. 2, ch. 7*, in connexion with that lien.

If a sheriff's sale under a *fi. fa.* can be impeached, upon the ground of due notice of the sale not being given, that fact must appear affirmatively—for every thing is to be presumed in favor of the performance of his duties.

A sheriff's return to a *fi. fa.* which reports a sale of lands, or his deed to the purchaser under the execution, is a sufficient memorandum in writing within the statute of frauds. It is not necessary that the return should be endorsed on the writ, or the deed executed at the time of the sale.

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APPEAL from *Charles County Court*.

Ejectment by the appellee, against the appellant, commenced on the 6th of March, 1826, for two tracts of land, called "*Posey's Chance*," and "*Hopewell's Addition*."

1. At the trial the plaintiff read in evidence a writ of *feri facias*, issued upon a judgment rendered at March term, 1824, at the suit of the *State of Maryland*, for the use of the plaintiff, against *Samuel Hanson*. The writ issued on the 28th of August, 1824, tested the day preceding, and was returnable to the then ensuing March term of *Charles County Court*, and the sheriff's return as follows: "Laid as per schedule, and after due and legal notice being given, of the time and place of sale, the negroes mentioned in the within schedule, sold for \$415—\$214 39, applied towards *fi. fa.* No. 1.—\$15 97½ applied towards *fi. fa.* No. 2, and the residue being \$8 89½, retained for sheriff's fees on ditto, \$174 63—the balance being \$165 73, applied towards the discharge of this *fi. fa.* The lands contained in the schedule, sold to plaintiff for \$277—\$4 15 retained for sheriff's fees on ditto, and the residue being \$272 84, applied towards the discharge of this *fi. fa.* per receipt. *Alex. Matthews, Sheriff.*" Schedule accompanying the foregoing return. *Charles County*, to wit:—We, the subscribers, being duly summoned and sworn by the sheriff of *Charles county*, to value and appraise the goods and chattels, lands and tenements of *Samuel Hanson, Sr.* taken by virtue of a writ of *feri facias*, at the suit of the *State of Maryland* use of *John Barnes*, do value and appraise the same in current money as follows, to wit: all of said *Samuel Hanson, Sr.*'s right, title, claim and interest, whether in law or equity, of, in and into the following tracts, parts of tracts, or parcels of land, lying and being in *Charles County* aforesaid, called or known by the following names, to wit: *Posey's Chance*, containing 100 acres, more or less, \$4 per acre—*Pt. Hopewell's Addition*, containing 44 acres, more or less, at \$4 per acre—*Brawner's Chance*, containing 50 acres, more or less, at \$4 per acre;

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and *Pt. Gonier's Choice*, containing 100 acres, more or less, \$4 per acre—Also the following personal property, to wit, &c. Given under our hands and seals the 9th day of October, 1824.”—On the back of the foregoing schedule is thus endorsed, to wit: “January 8th, 1825, the within land sold to *John Barnes* for \$277 00.” Receipt accompanying the foregoing return—“Received, June 13th, 1825, from *A. Matthews*, Esq. \$786 35, in full for money due me on the within writ.—*J. Barnes*.” He also offered in evidence, a deed from the said sheriff to the lessor of the plaintiff, for the lands in the schedule contained, executed, acknowledged and recorded on the 6th of March, 1826; and proved, that Doctor *Samuel Hanson* died in possession of the said lands, and of considerable personal property. That the defendant in this cause, was one of his heirs and representatives. It was further proved by the then sheriff, *Alexander Matthews*, that the said *fieri facias* was delivered to him at nine o'clock on the 28th of August, 1824, and that Doctor *Hanson* died on the 1st of September following. That the court of *Charles County* was in session at the time of issuing the said *fieri facias*, which session commenced the — day of August of said year, and ended on the 3d of September. Thereupon the defendant prayed the opinion of the court, and their instructions to the jury. 1st. That the plaintiff was not entitled to recover, without producing in evidence a grant from the State, and deducing the title of the debtor in said *fieri facias* mentioned. 2d. That as the said *fieri facias* was tested on the 27th day of August, 1824, when the court was in session, as before stated, and without the special order of said court, that it issued irregularly, and that the proceedings under it were void against the present defendant. 3d. That as Dr. *Hanson* died on the 1st of September, and the said *fieri facias* was not levied until the 9th of October; that the issuing of said *fieri facias*, and delivery to the sheriff as stated, did not bind the lands of the debtor, which had descended to the heir. 4th. That although the issuing and

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delivery of said *fiery facias* as stated, might bind the land upon a deficiency of personal property, yet if the jury should believe, that there was a sufficiency of personal property to satisfy the same, that such personal property should first have been taken under said *fiery facias*—all which opinions the court refused to give. The defendant then offered in evidence the following advertisement, to wit: "*Sheriff's Sale*—By virtue of three writs of *fiery facias* to me directed, from *Charles County Court*, will be exposed to public sale, for ready cash, at the *Trap*, on the 8th of January next, the following property, to wit: all of *Samuel Hanson, Sr's* right, title, claim and interest in law or equity, of, in, and to the following tracts, parts of tracts, or parcels of land, lying and being in *Charles County, Durham Parish*, called and known by the following names, to wit: *Perry's Chance*, containing 100 acres, more or less—*Pt. Hopewell's Addition*, containing 44 acres, more or less—*Brawner's Chance*, containing 54 acres, more or less; and *Pt. Gonier's Choice*, containing 100 acres, more or less—and also the following personal property, &c. The whole taken in execution as the property of *Samuel Hanson, Sr.*, and will be sold to satisfy the following debts, to wit: one due to the *State of Maryland*, use *John Barnes*; one due to *William Bruce*, and one due to *Ignatius Semmes. Alex. Matthews, Sheriff—Charles County, December 6th, 1824.*" And proved by *Noble Barnes*, that he as deputy sheriff, levied the *fiery facias* and made sale of the land; that this advertisement was in his hand writing, and was an original advertisement giving notice of said sale, and that the land in question was sold on the day mentioned in said advertisement. That the said *Noble Barnes* did not make any written entry or other memorandum of said sale; that he acted as auctioneer at the said sale, but the high sheriff was present and attended to the sale. The defendant then prayed the opinion of the court, that unless the plaintiff proved to the jury, that there was some entry or memorandum in writing of the sale, that the sale was void—which

opinion the court refused to give—But directed the jury that the return of the sheriff on the *fieri facias*, and deed to the purchaser, the present plaintiff, was a sufficient memorandum in writing, and could not be rebutted, but by proof of fraud and collusion between the sheriff and the purchaser. The defendant then offered in evidence the endorsement of the *fieri facias*, and return thereof, which was interlined and written with ink of different colors, and prayed the opinion of the court, that if the jury should believe that said endorsement and return was made *post litem motam* in this cause, it was competent evidence of fraud and collusion to go to the jury—which opinion the court also refused to give. The defendant then lastly prayed the opinion of the court, that if the jury should believe, that due and legal notice of the sale of the tract of land called *Posey's Chance*, as required by the act of assembly, was not made, that then the title of said tract did not vest in the purchaser by said sale, and for said tract the plaintiff was not entitled to recover—which opinion the court refused to give.

The defendant excepted to all these refusals of the court, to grant his prayers, and the verdict and judgment being for the plaintiff, he prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J., EARLE, ARCHER, and DORSEY, J.

Browner, for the appellant, contended,

1. That as *Samuel Hanson* died before execution actually executed, the lands in the possession of his heir, could not be taken in satisfaction of the judgment against the father, until upon a suggestion and proof of deficiency of personal assets. *Jacobs' Law Dic. tit. Exec. 495.* 2. That a *fieri facias* binds goods and chattels, from the date of the delivery to the sheriff, but not lands, upon which, the judgment and not the *fieri facias* operates as a lien; and that after a *descent cast*, before execution levied, resort must be had to the personal estate. *Harding vs. Stevenson*, 6 *Harr. and Johns.* 267. The act of 1785, ch. 72, sec. 5

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1798, *ch. 101, sub-chap. 8, sec. 17*. 1 *Sellon's Pr.* 532. *Arnott and Copper vs. Nichols*, 1 *Harr. and Johns.* 472. *M'El-derry vs. Smith*, 2 *Ib.* 72. The statute of 5 *Geo. sec. 2, ch. 7*. 3. That parol proof of the date when the *fieri facias* was received by the sheriff, is inadmissible. 4. That there is not sufficient proof of any note or memorandum in writing being made at the time of the sale. On the contrary, the deputy sheriff who made the sale, did not make any entry or memorandum thereof. 5. That notice of the sale of the tract called *Posey's Chance*, was not given according to the act of assembly of 1816, *ch. 129*, and that the sale, as to said tract, was void, if even plaintiff could recover as to the other tracts.

C. Dorsey, for the appellee.

1. The *fi. fa.* continues to run, and must be executed as to personal property, notwithstanding the death of the defendant, after the writ is delivered to the sheriff. *Sellon's Pr.* 528. Since the statute of 5 *Geo. 2, ch. 7*, lands are made liable to the payment of all debts, and are subject to like remedies, proceedings and process, in any court of law or equity, that personal estate is. 2. In *Bull's Lessee vs. Sheredine*, 1 *Harr. and Johns.* 410, and *Barney vs. Patterson's Lessee*, 6 *Harr. and Johns.* 182, the court recognise the doctrine, that the sheriff's return gratifies the requisitions of the statute of frauds. 3. The object of the prayer in regard to the notice of sale, was to transfer a question of law from the court to the jury. It belongs peculiarly to the court to say what is legal notice. The question of the legality of sales is a mixed question of law and fact, and the prayer, therefore, should have been for a hypothetical direction.

ARCHER, J., delivered the opinion of the court.

It is supposed, that the death of the defendant, before a levy on the *fieri facias*, although it was issued, and in the hands of the sheriff before his death, would render a *scire*

facias against the heirs and *terre tenants* necessary, and that the sale, made under a *fieri facias* thus issued, and thus levied, passed no title to the purchaser.

Whether the alienation of land to a *bona fide* purchaser, or its descent to the heir before any steps are taken by the plaintiff, to put his judgment in execution, would render a *scire facias* against the heirs and *terre tenants* indispensable, it is not necessary to determine. For the question presented here, is whether pending proceedings in execution of the judgment, and which were all rightful and proper, at the time of their institution, the death of the defendant suspends them in point of law, or if in fact they are afterwards put in execution, the law declares them void. If this were a question connected with a levy on personal property, it would be too clear for discussion. The execution would go on, and the plaintiff would have a right to reap the fruits of his judgment. But this is a levy on land. Should it be governed by different principles? There is no process of execution in *England*, bearing an exact affinity to our *fieri facias*, so far as this question is concerned. We will, however, proceed to notice those, which bear to it the strongest resemblance.

A writ of *sequestration*, being a personal process, grounded on a contempt, and requiring the further order, or action of the court, to give it an effect beneficial to the plaintiff, it is remarkable that it should have been doubted, whether it did not abate *de facto*, by the death of the defendant. Yet it appears to have been long in uncertainty; but it is now settled, that it does abate by the death of the defendant. 3 *Atk. Burdett vs. Rockey*, 1 *Vern.* 58. 2 *P. Wm.* 621. *Wharam vs. Broughton*, 1 *Ves. Sen.* 182. These determinations will show the diversity of views which have been entertained on the subject, and the latter opinions of the court, will show that its abating, depends upon reasons and principles which will not apply to the process under consideration.

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The writ of *extent* on a statute merchant, will not abate by the death of the defendant; 2 *P. Wm's*. 621.; and in 2 *Saund.* 70, (C) it is said, that an extent shall go, notwithstanding the death of the defendant shall be returned on a *capias si laicus*. And the same doctrine would seem to be deducible, with regard to a writ of *extendi facias*, issued on a statute staple, or on a recognizance in the nature of a statute staple from 2 *Saund.* 70, (C) in which the nature and character of the sheriff's return, with regard to the lands extended, where the sheriff shall return the death of the defendant, is pointed out. The same principles would seem to apply to the writ of *elegit*, in which any future action of the court, to give the plaintiff the entire benefit of his execution becomes unnecessary; for the inquisition, appraisement, and delivery of a moiety of the lands, is done under the direction of the sheriff and the authority of the *elegit* itself. Like the writs of *elegit* and *extendi facias* upon a statute merchant, the *fieri facias* requires no other order or action of the court, to give to the plaintiff the fruits of his execution. These are reaped, when the sheriff discharges his duty under the process. The mandate goes to the sheriff to seize and sell the lands, and if it be regular in its inception, he derives his authority from the writ, and is bound to execute it. Unlike the original writs, judicial writs do not in general abate by the death of the party. 1 *Bac. Abr. title Abatement*.

The general principle, that where a new person is to be benefitted, or charged by the execution of the judgment, there ought to be a *scire facias* to make him a party, is admitted; but it cannot apply to a case, where the new party becomes interested, after the process is regularly in the hands of the officer for execution. If this be not an exception to the rule, and a *scire facias* against the heirs and *terre tenants* be necessary, then successive alienations and descents, might defeat the plaintiff, *ad infinitum*. Even excessive vigilance could not always secure to the plaintiff the satisfaction of his judgment.

It supposed that there existed no right under the *fieri facias* to levy on the lands, if there was a sufficiency of personal property to satisfy the judgment. Under the writ of *elegit*, if there be enough of personal goods, the sheriff ought not to levy on the lands. But this duty of the officer under the writ of *elegit*, grows out of the statute of *West. 2. 13 Edw. 1. ch. 18*, which gave that writ. But the statute of *5 Geo. 2, ch. 7*, stripped lands in the Plantations, of the sanctity with which they had been guarded, and by subjecting them to sale, no longer considered them as a secondary fund for the payment of debts in the hands of the debtor, but rendered them equally liable with his personalty. It is at the election of the plaintiff, whether he will seize lands or goods, and this has always been the construction of the statute, unless under peculiar circumstances of equity he shall be restrained from exercising his election, to the prejudice of an alienee, devisee or heir. It is true, that after the death of a debtor, lands are only secondarily liable; but this must be taken with the qualification, that prior to the death of the debtor, they had not become liable to be affected by an execution. It does not appear from the evidence in the cause, that any endorsation was made on the back of the writ, as the statute demands of the sheriff, of the day of its delivery to him, and it is therefore supposed that parol evidence to establish that date is inadmissible. If this idea be correct, there exists scarcely a case in *Maryland*, in which the date of a delivery of a *fieri facias* to the sheriff, could be proved. This requisition has in practice been neglected, and fallen into disuse. To give the statute such a construction here, would make its provision in this respect a dead letter. Its object, was only directory to the officer, that means might be placed in the power of every one, to derive benefit from the salutary provisions of the statute; and was not meant to exclude other evidence, should that officer neglect his duty. *Bealls vs. Guernsey*, 8 *Johns.* 52. There is then proof in the record, that the *fieri facias* was delivered to the sheriff

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before the death of the debtor, if it were material to have established that fact. But suppose the fact had not been established, but that merely an execution had been issued by the plaintiff in the judgment; it is most certain that lands in the seizin of the heir, might be levied upon, because the statute renders them liable to seizure, sale, and disposition, in the same manner as personal property; and in such a case, the levy could have been made on the personal property, in the hands of the executor; for the judgment and execution, binds the personal property from the day of the signing of the judgment, and the test of the writ of execution, against the party himself, and all other persons except purchasers. 1 *Saund. Rep.* 219, *f.* It is true, that the *fieri facias* does not bind land, as it does personal property from the delivery of the writ to the sheriff. The statute of *Charles II.* only applying to goods, but the lien on the lands is from the rendition of the judgment, and the right to execution of lands in the tenure of the heir, grows out of the statute of 5 *Geo. 2, ch. 7*, in connexion with that lien.

It does not become necessary to express an opinion how far the sheriff's sale would be operative, to pass title to a purchaser, unless he shall have given the notice of sale required by law, because there is no evidence in the record, from which the jury could infer, that notice had not been given. The adduction of a single advertisement, which does not even appear to have been any where published, or affixed to give notice to the public, can furnish no data for deductions, that regular notices were not given, and in the absence of evidence to that effect, every thing is to be presumed in favor of the performance of his duties by the sheriff. It has been objected, that no memorandum in writing, of the sale by the sheriff, was made at the time of the sale. The sheriff has made a return to the *fieri facias*, which evidences the sale, and has executed a deed to the purchaser, either of which is sufficient evidence of the sale, and a sufficient memorandum, in writing, within the statute

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of frauds. *Barney vs. Patterson*, 6 Harr. and Johns. 182. It is clearly not necessary, that the return should be endorsed on the writ, or the deed executed at the time of sale.

We have thus noticed all the points which have been raised before us. There are in the record, several other opinions of the court, from which exceptions have been taken, but they have not been argued before us, and we have considered them as abandoned.

JUDGMENT AFFIRMED.

PENN vs. FLACK and COOLEY.—*December, 1831.*

A prayer by the defendant addressed to the court, requesting them to instruct the jury, that "the plaintiff upon the evidence, is not entitled to recover upon either count in the declaration," is, since the act of 1825, ch. 117, too general in its terms, and the refusal to grant it, is not the subject of an appeal.

The endorsee of the payee of a negotiable note, can maintain an action for money had and received, against the maker of the note, upon the proof of the note and endorsement.

Where the declaration averred that a negotiable note was endorsed, before it fell due, and it appeared upon the production of the note, that it was endorsed after maturity, this was held to be no material variance.

APPEAL from *Montgomery County Court.*

Assumpsit by the appellees, as the endorsees of the following promissory note, against the appellant, *William G. Penn*, as the maker thereof, commenced on the 11th of October, 1827.

"\$80. Sixty days after date, I promise to pay to *John Morrison*, or order, eighty dollars, without defalcation, value received. *Wm. G. Penn. May 21st, 1818.*" Endorsed. "Pay to *James Flack, & Co.* April 24th, 1824. *John Morrison.*"

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The declaration contained a *count* on the note, setting out the endorsement, which it averred to have been made, *before* the time limited in the said note for the payment thereof, to wit, on the day and year aforesaid, at the county aforesaid, (being the day of its date;) and also contained *counts* for money lent and advanced; money paid, laid out, and expended; and money had and received. The defendant pleaded *non-assumpsit*, and issue was joined.

1. At the trial, the plaintiffs offered in evidence the promissory note, having proved that the same was signed by the defendant, and that in the year, 1824, the said note was purchased by the plaintiffs in this action, (who are *James Flack & Co.*) and assigned to them by a certain *John Beal*, the endorsement of *John Morrison*, the payee, then appearing on it; and that on the 24th of April, 1824, after the said assignment was made, the said note was presented in behalf of the plaintiffs to the defendant, who paid \$20 thereon; admitted the note to have been made by him; and said, that in a month's time, he would pay the original amount of the note, but would not pay interest, because he had sent the money by a neighbor to pay the note to the owner, before it came into the hands of the plaintiffs, but the owner could not be found. The defendant thereupon prayed the court to instruct the jury, that the plaintiffs upon the evidence, were not entitled to recover upon either count in the declaration. But the court (*KILGOUR, A. J.*) refused to give the instruction. The defendant excepted.

2. After the evidence contained in the first bill of exceptions had been given, the defendant further prayed the court to direct the jury, that unless they were satisfied the endorsement to the plaintiffs, had been made before the expiration of the time when the said note became payable, the plaintiffs were not entitled to recover. This instruction the court also refused to give. The defendant excepted, and the verdict and judgment being against him, he appealed to this court.

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The cause was argued before BUCHANAN, Ch. J., EARLE, STEPHEN, and ARCHER, J.

Alexander, for the appellant, contended,

1. That the prayer of the defendant, in the *2d exception*, ought to have been granted. The declaration alleged, that the endorsement to the plaintiffs was before the note fell due, when the proof was otherwise. This is a variance which is fatal. *2 Stark. Ev.* 245. He insisted, that all averments in a declaration are material, and must be proved, which affect the defences open to the defendant. If the averment in this case had been true, the defendant could not show a want of consideration, which he would be allowed to do, if the note had been endorsed to plaintiffs, after it became due, as was the case in point of fact. 2. It appears from the evidence, that the plaintiffs purchased the note; and therefore it is not proof of money had and received by the drawer for their use; neither could it be considered as evidence of money paid, laid out, and expended by them, for the use of the drawer. *2 Stark. Ev.* 99. A note is only evidence under the money counts, as between the immediate parties. *1 Saund. P. and Ev.* 340. *Waynam vs. Bend*, *1 Campb.* 175.

Johnson and Gill, for the appellees.

1. The averment as to the *time* of the endorsement is immaterial. If the evidence shows, that the endorsement took place subsequent to the maturity of the note, the defendant will be let into the defence of a want of consideration, notwithstanding the averment to the contrary in the declaration. The averment therefore can have no influence on the defences open to him. *Young vs. Wright*, *1 Camp.* 140. *Russell vs. Langstaff*, *2 Doug.* 514. If the action was against the *endorser*, the case might be different, but as respects the maker, the averment as to time is perfectly immaterial. The liability of the maker to the endorsee, arises from the *fact* of the endorsement, and not its date.

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Chitty on Bills, 286. *Grant vs. Vaughan*, 3 *Burr*, 1516, 1525. 2. The note was evidence under the money counts. The promise of the maker is, that he will pay to the payee, or his order; and when he gives the order by endorsement, the maker holds the money for the use of the endorsee. *Young vs. Wright*, 1 *Campb.* 140.

STEPHEN, J., delivered the opinion of the court.

This case presents two questions for the decision of this court. The first is, whether an endorsee of the payee of a note, can maintain an action for money had and received, against the maker? and the second, whether it is a material variance to declare that a negotiable note was endorsed by the payee before it became due, and to offer proof of an endorsement after it fell due? Upon the first question there is a contrariety of opinions in the books, but upon the most mature deliberation, we are of opinion that the action is maintainable, upon sound legal principles; the note is a contract by the maker to pay the money to the payee or his endorsee. It is well established, that in an action by the payee against the maker, the note is evidence upon a count for money had and received; being therefore, evidence of money had and received to the use of the payee, by the maker, when the payee transfers his interest in the note by endorsement, (the note being payable to the payee or his order,) it would seem to follow, that by the very terms of the contract, the endorsee would become substituted in the place of the payee, and be invested with all his legal rights, not only as relates to a suit upon the note since the *statute of Ann*, but also as to the common law count of money had and received. In the case of *Grant vs. Vaughan*, 3 *Burrows' Rep.* 1516, which was an action by the bearer of a bill of exchange against the drawer, which bill was in the following words, "Pay to Ship Fortune, or bearer," so much, *Lord Mansfield* makes the following remarks. "But upon the second count, (which was for money had and received,) the present case is quite clear, beyond all

dispute. For undoubtedly an action for money had and received to the plaintiff's use, may be brought by the *bona fide* bearer of a note made payable to bearer. There is no case to the contrary. It was certainly money received for the use of the original advancer of it; and if so, it is for the use of the person, who has the note as bearer. In this case, *Bicknell* himself might undoubtedly have brought this action. He lost it, and it came *bona fide* and in the course of trade, into the hands of the present plaintiff, who paid a full and fair consideration for it. *Bicknell* and the plaintiff are both innocent. The law must determine which of them is to stand to the loss, and by law it falls upon *Bicknell*." In this case the bill was payable to bearer; in the case now before this court, it was payable to order, and it seems to us that it would require a considerable degree of legal ingenuity, to distinguish between the two cases, in point of legal principle, as to the legal operation of the two contracts. They were both negotiable in their characters, the only difference is, that the one was payable to bearer, the other to order. In 12 *Johns. Rep.* 90, the action was brought on two promissory notes: one was in the following words. "For value received, due *Wm. Douglass* or bearer, \$14 50, with interest, payable the 1st of March next, *Springfield*, 8th Nov. 1811, signed *James Pierce*." The second note was dated, Dec. 25th. 1811, and the defendant promised for value received, to pay *Wm. Douglass*, or bearer, the sum of \$18, with interest. In a suit brought upon these notes, the plaintiff below, under the direction of the court recovered, and upon a writ of error being brought to the *Supreme Court*, that court delivered the following opinion. "This was an action of *indebitatus assumpsit*, for money had and received, money lent, &c. and the chief question is, whether the promissory notes in the hands of the plaintiff below, as bearer, were properly admitted in evidence under such a count. It is clear, that as well before, as since the statute making notes negotiable, the person named as payee, might give such note in evidence, un-

der the general counts for money lent, or money had and received, &c.” (here this court refers to a number of authorities, and amongst them, the case of *Grant vs. Vaughan*, above referred to, and then proceeds.) “The *statute of Ann* gave an additional remedy, but did not take away the old one.” “If, as all agree, such a note before the statute, was evidence of money due from the maker to the payee, so as to support a count for money had and received, I can see no good reason why an assignee by endorsement or delivery ought not to have the same remedy. It was the object of the statute to place the assignee in the same relation to the maker, as the payee stood in before; and the legal operation of the transfer is, that the money which by virtue of the note was due to the payee from the maker, is now due from the maker to the assignee. These notes were payable to *William Douglass* or bearer, like the form used in bank notes. Bearer is *descriptio personæ*, of the real payee. It may be that *Wm. Douglass* had no knowledge of the note, or is a fictitious person. The note however, is transferable by delivery merely, and possession was evidence of property in the plaintiff below, *prima facie*. It is objected by the counsel for the defendant, that here is no privity of contract between these parties; and several authorities were cited to show, that *indebitatus assumpsit*, will not lie except between privies. To this objection there are two answers—first, there is a legal privity of contract between the maker of a negotiable note and the assignee or bearer in this case. It is a contract to pay the money to whoever may become entitled to it by transfer, as bearer; and such privity commences, as soon as the bearer becomes so entitled.—Secondly, it is not true, that the action for money had and received, can only be grounded on privity of contract. It lies against the finder of money lost. It is the proper action to recover money obtained by fraud or deceit. If a man without my authority, receive money due to me, I may recover it from him in this form of action, and certainly in these cases there is no privity of contract.

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In the case of *Wayman vs. Bend*, 1st Campbell's *nisi prius*, 175, precisely like the present case, Lord *Ellenborough* decided, that the right of giving a promissory note in evidence under the general money counts, is confined to the original party to whom the note was payable. But this was a *nisi prius* opinion: and as the plaintiff in that case recovered on another count as endorsee of the same note, it never became material to revise the decision. That opinion of Lord *Ellenborough* contradicts the decisions of several of his illustrious predecessors. In the case of *Tablock vs. Harris*, 3 D. and E. 174, it was decided, that an endorsee of a bill of exchange may recover against the acceptor, under a count for money had and received; and Lord *Kenyon* there says, "in making this decision we do not mean to infringe a rule of law, which is very properly settled, that a *chose in action* cannot be transferred: but we consider it as an agreement between all the parties, to appropriate so much property, to be carried to the account of the holder of the bill." In the case of *Grant vs. Vaughan*, 3 Burr. 1516, it was decided, that *indebitatus assumpsit* for money had and received was a proper action to recover the value of a bill of exchange by the bearer against the drawer: and Lord *Mansfield* there says, "undoubtedly an action for money had and received to the plaintiff's use, may be brought by the *bona fide* bearer of a note, made payable to a bearer; there is no case to the contrary." The case of *Cruger vs. Armstrong and another*, 3 Johns. Cases, 5, supports the same doctrine. The principles contained in this decision are fully sustained by the Supreme Court of the *United States*, in the case of *Raborg and others vs. Peyton*. In that case, (which was an action of debt brought by the endorsees of a bill of exchange against the acceptor,) Mr. *Justice Storey*, in delivering the opinion of the court says, "privity of contract may exist, if there be an express contract, although the consideration of the contract originated *aliunde*. Besides, if one person deliver money to another, for the use of a third person, it has been settled that such a privity exists, that the latter

may maintain an action of debt against the bailee. In general, the legal predicament of the maker of a note, is like that of the acceptor of a bill. Each is liable to the payee for the payment of the note or bill, in the first instance; and after endorsement each incurs the same liabilities." The judge, in delivering the opinion of the court, further remarks, that, "in point of law every subsequent holder, in respect to the acceptor of a bill, and the maker of a note, stands in the same predicament as the payee. An acceptance is as much evidence of money had and received by the acceptor to the use of such holder, and of money paid by such holder for the use of the acceptor, as if he were the payee."

The only remaining question is, whether, when a note is declared on by the endorsee against the maker as being endorsed before it is due, it is a material variance to prove it to have been endorsed after it became payable? In *Chitty on bills*, 462, the law is stated to be, that "if a note payable to bearer be declared on as endorsed, the endorsement must be proved; but when the declaration states, that the endorsement was after the making of the bill, and it appears in evidence to have been before, or that it was before the bill was due, and it appears in evidence to have been made afterwards, this is not a material variance." In support of this principle, he refers to *Young vs. Wright*, 1 *Campb.* 139.

In this case we think it proper to observe, that it appears to us, that the prayer in the first bill of exceptions is too general under the act of 1825, but, as the prayer in the second bill of exceptions is sufficiently specific, and the case was fully argued, to prevent future litigation, we have delivered our opinions upon both exceptions.

We are of opinion, that there is no error in the judgment of the court below, and that it ought to be affirmed.

JOSIAH TURNER vs. JAMES WALKER.—December, 1831.

Where goods taken under a *fi. fa.* have been sold for a part of the amount due on the judgment, a *ca. sa.* cannot be legally issued for the residue, until the sheriff has made a *final* return of the *fi. fa.* showing what has been done with the property. This return should be in term time; if made in the recess to the clerk's office, it is void. The same principles apply to a *venditioni exponas*.

An action upon the case is the proper remedy against one who maliciously procures a *ca. sa.* to be issued, and another to be arrested under it.

The foundation of such an action is malice, and a want of probable cause, which must be proved.

The fact of malice is always a question for the jury.

Malice may be, and most commonly is, in such actions, implied from the want of reasonable or probable cause, that being first established. But the presumption of malice resulting from the want of probable cause is not conclusive, and the defendant, for the purpose of rebutting the inference of malice, may be let in to show, for instance, that he acted under the advice of counsel. The effect of such evidence, is however, for the jury.

Evidence of the conduct and declarations of the defendant in relation to, and in the course of the transaction—of the situation of the parties—of the nature and extent of the injurious means resorted to by the defendant to effect his object, and of his forwardness, zeal and activity manifested in the procurement and use of the means employed, may properly be adduced to prove malice.

It is generally true, that in an action for a malicious prosecution, or a malicious arrest, malice—the want of probable cause, and also the determination of the prosecution, or of the suit in which the writ was sued out, must be averred and proved.

But where a *vendi.* was sued out, returnable to *March*, and the sheriff in fact executed that writ, and returned it to the clerk's office in *December*, and the plaintiff then sued out a *ca. sa.* which was also returnable to the same term, with the *vendi.* under which the defendant was arrested and imprisoned in *December*, the reason for averring in an action upon the case, the want of probable cause for the arrest, and the determination of the suit, does not exist, and a declaration showing the facts specially, in the absence of the ordinary averment, would be sufficient.

It is not upon the evidence, but upon the pleadings, and evidence applicable to the pleadings, that a plaintiff can recover in any case.

Where the plaintiff, who had obtained a verdict in an action for a malicious arrest, died pending an appeal, the court, on reversing the judgment upon a bill of exceptions, refused a *procedendo*.

Turner vs. Walker.—1831.

APPEAL from *Prince George's County Court*.

This was an action on the *case* brought by the appellee, against the appellant, on the 10th of January, 1827, in *Saint Mary's County Court*, and removed, upon the suggestion of the defendant, to *Prince George's County Court*.

The declaration was as follows: "For that heretofore, to wit, on the 13th of December, 1826, at, &c., the said *Josiah*, unlawfully and maliciously procured, and caused to be issued out of the clerk's office of the County Court of said county, a certain precept of the said court, commonly called a writ of *capias ad satisfaciendum*, attested by the chief judge, and certified by the clerk of the said court, under the seal of office of the said clerk, bearing date the 13th of December, 1826, directed to the sheriff of the said county, commanding him to take the body of him the said *James* into his custody, and him safely keep in his custody, by the authority of the said writ; and that the said *Josiah Turner*, then and there unlawfully and maliciously delivered the said writ to *William Williams*, the sheriff for the time being, of the said county; and then and there, unlawfully and maliciously procured, and caused the said sheriff, then and there, to arrest the said *James*, and imprison him for a long time, to wit, for the space of two months thence next ensuing the said arrest; he, the said *Josiah*, then and there pretending and declaring to the said sheriff, that the said writ was lawful and right, and fully authorised and required the said sheriff to arrest and imprison the said *James*; whereas the said *James* avers, that the said writ was unjust and unlawful, and oppressive to him, and obtained by fraud and deceit; and the said *James* in fact says, that the said *Josiah Turner* did, on the day and year last aforesaid, at the county aforesaid, unlawfully, maliciously and fraudulently, cause and procure, by the means aforesaid, the arrest and imprisonment of him the said *James*, in manner and form, and for the time aforesaid, in abuse of the legal process of the said court, and in contempt and disregard of the said court, and its authority; and in oppression of him the said *James*, to

the damage," &c. The defendant pleaded not guilty, and issue was joined.

1. At the trial the plaintiff read in evidence to the jury by consent of parties, the record of a writ of *capias ad satisfaciendum*, issued out of the clerk's office of Saint Mary's County Court, on the 13th of December, 1826, on a judgment in said court, at the suit of *William T. Cross & Co.* use of *Josiah Turner*, against *James Walker*. The writ recites, that on the 22d of March, 1825, a *fieri facias* had issued on said judgment, returnable to the first Monday in August then next. That on the return day of said writ, the sheriff returned that he had taken in virtue thereof, sundry real and personal estate, the property of *Walker*, which remained on hand for want of buyers, and which said goods and chattels were replevied out of his hands. It further recited, that on the 28th of August, 1826, a writ of *venditioni exponas*, issued for the sale of said real and personal property, returnable to the first Monday of March next following—which last mentioned writ, the sheriff returned on the 12th of December, 1826; that by virtue thereof he had sold the property levied on for the sum of \$88 25, and which was not sufficient to satisfy the said judgment at suit of *Cross & Co.* for the use of said *Turner*. Whereupon the said sheriff was commanded, &c. At the return day of said *capias ad satisfaciendum*, to wit, on the first Monday of March, 1827, the sheriff returned the same "*cepi*," when a motion was made by the said *Walker*, to quash the same, upon the ground that the writ of *venditioni exponas*, was returned to the clerk's office, on the 12th of December, 1826, being in in the vacation or in the recess of the court; and that on the 13th of December, 1826, the plaintiff caused the *ca. sa.* to be issued. The County Court quashed the said *ca. sa.* and discharged the defendant, *Walker*, from custody. It was agreed that the *fieri facias* and return thereto, the *venditioni exponas* and return, the *capias ad satisfaciendum* and return, and the motion to quash the same, with the proceedings thereon, should have the same effect as if the records were

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inserted at large. The plaintiff also proved that he was arrested by the sheriff of *Saint Mary's* County, on the 14th or 15th of December, in the year 1826, and kept in close custody for seven or eight days, by virtue of the said writ of *capias ad satisfaciendum*, the defendant being present at the time of the arrest, ordering it to be done, and directing the said sheriff to keep the said plaintiff in close confinement. The plaintiff further proved by *Joseph Harris*, clerk of *Saint Mary's* County Court, that he was applied to by the defendant, on the 13th December, 1826, the day on which the *capias ad satisfaciendum* issued, to issue the same, that he objected to doing so, upon the ground that it was unusual, and would not issue the same, unless written orders were given to that effect: that such orders were given by *G. N. Causin, Esq.* the counsel for the present defendant; he the defendant being at the time present, sanctioning and approving of the orders given by the said counsel. Whereupon the defendant, by his counsel, prayed the court to instruct the jury, that the above *capias ad satisfaciendum* was legally issued, and that the plaintiff could not support his action—which instruction the court [STEPHEN, Ch. J., and KEY, A. J.] refused to give, and instructed the jury, that the said writ was issued irregularly and illegally, and that the arrest, above stated, of the plaintiff under it, was a sufficient ground to support the present action.

The defendant then prayed the court to instruct the jury, that the plaintiff, on the above evidence, could not support the present action on the case, but should have brought an action of *trespass vi et armis*, which instruction the court also refused to give; and instructed the jury, that the plaintiff was entitled to recover in the present form of action. The defendant also prayed the court to instruct the jury, 1st. That the *capias ad satisfaciendum* was legally issued; the judgment on which it was issued, being in force and unsatisfied, and the whole of the property seized under the *fiery facias* having been sold; and the writ under which the sale had been made, having been previously returned by the

sheriff. 2d. That if the plaintiff in the suit had no right to apply for a *ca. sa.*; at the time it was issued the clerk had no authority to issue it, and there being no legal authority for the issuing of the same, it was a nullity. 3d. If the writ ought not to have been issued, the sheriff to whom it was directed, and who had previously made the return of the *venditioni exponas* aforesaid, was not bound to execute it. 4th. That if the said writ of *capias ad satisfaciendum*, was improperly issued by the clerk, the defendant in this suit is not answerable in damages to the plaintiff, for any act done previous to the arrest. 5th. That damages for the act of arrest, can be recovered only in an action of *trespass vi et armis*. 6th. That if the plaintiff had offered proof of any injury, which entitled him to recover damages in an action on the case for a malicious arrest, yet that the *nar.* does not entitle him to recover such damages, inasmuch as it does not state that the proceeding which is made the ground of the action, was commenced without probable cause, nor ended. 7th. That if this be an action on the case of any other description, the plaintiff cannot recover, because the injury of which he complains in the declaration, is not charged in the declaration to follow consequentially from any act of the defendant, other than that of causing the plaintiff to be arrested. 8th. That if the jury should be of opinion, from the evidence, that the defendant, when he applied to the clerk of *Saint Mary's* County Court for, and obtained the writ of *ca. sa.* aforesaid, did not believe it was illegal to issue the same, and at the time of putting the same into the sheriff's hands, he did not believe that the arrest of the plaintiff in virtue of the same would be illegal, but had been advised by his counsel, and believed that he had a right to sue out the same, and have the defendant arrested under it; and further, that the defendant, when he directed the same to be served, did not claim more than the balance *bona fide* due on said judgment, after allowing the whole sum made on the *venditioni exponas* aforesaid, then the plaintiff is not entitled to recover upon the plead-

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ings and issue in this suit. 9th. That if the jury should be of opinion from the evidence, that the clerk of *Saint Mary's* County Court, upon being applied to by the defendant, refused to issue the *ca. sa.* aforesaid, and that the same was issued by the clerk aforesaid, after his refusal aforesaid, and in consequence of the directions of *G. N. Causin, Esq.*, an attorney of said court and the counsel of the defendant in that cause, then the plaintiff, upon the pleadings and issue in this cause, is not entitled to recover, although the defendant was present at the time of the issuing of the same, and repeated his request to the said clerk; and was afterwards present, at the time of the arrest of the plaintiff, and directed it, and also directed the sheriff to commit him to prison. These several instructions the court refused to give. The defendant excepted, and the verdict and judgment being against him, he brought the present appeal.

The cause was argued before BUCHANAN, Ch. J., EARLE, and ARCHER, J.

Magruder and *Stonestreet*, for the appellant, contended,

1. That the court erred in refusing to instruct the jury that the *ca. sa.* was legally issued. 1 *Archbold, Pr.* 270. *Oviat vs. Vynar*, 1 *Salk.* 318. *Miller vs. Parnell*, 6 *Taunt.* 370. 1 *Sellon, Pr.* 535.
2. That there was error in instructing the jury, that the *ca. sa.* and the arrest in virtue of it, were sufficient to support the action; without saying that it was necessary to prove malice, or want of probable cause, or even that they must believe any part of the testimony, in order to find a verdict for the plaintiff.
3. If the plaintiff had a right of action, and especially if he could sue and recover, without alleging and proving malice, and a want of probable cause, the action ought to have been an action for false imprisonment, *trespass vi et armis* and not an action on the case.
4. That there was error in refusing to instruct the jury, that if they were of opinion,

that the plaintiff in error, when he applied to the clerk for the writ, did not believe it was illegal to issue the same ; and at the time of putting the same in the sheriff's hands, did not believe that an arrest in virtue thereof, would be illegal ; but had been advised by the counsel, and believed he had a right to sue out the same, and that when he directed it to be served, did not claim more than the balance *bona fide* due, after deducting what was made on the *venditioni exponas* ; then the plaintiff was not entitled to recover upon the pleadings, and issue in the cause. On the 2d, 3d, and 4th points, they referred to *Morgan vs. Hughes*, 2 *Durnf. and East*. 225, 231. *Snow vs. Allen*, 2 *Serg. and Low*. 485. *Ravenga vs. McIntosh*, 9 *Ib.* 225. 1 *Stark. Ev.* 503. *Purl vs. Duvall*, 5 *Harr. and Johns.* 69. 5. That there was error likewise, in rejecting the prayer, grounded upon the evidence in the exception, that the clerk refused to issue the writ when applied to by the defendant, and that he issued the same in obedience to directions from his counsel. 6. If the plaintiff had elected to waive the trespass, and sue for consequential damages, he was bound to have shown malice, and a want of probable cause, and that he had been legally discharged from the arrest, before he instituted his action, all of which should have been alleged in his declaration. *Towson vs. Havre De Grace Bank*, 6 *Harr. and Johns.* 47. 2 *Saund. P. Ev.* 192.

C. Dorsey and Johnson, for the appellee.

1. Is the present form of action the proper one, assuming that a right of action of some sort exists? They insisted, that in all cases, in which a party is imprisoned in virtue of process, the proper remedy against the party who causes it to be issued, is *case*. And the rule is the same, whenever process issues illegally, upon a regular judgment, whether it be against the property or person. *Hobert*, 205. *Gyfford vs. Woodgate*, 11 *East.* 297. *Elsee vs. Smith*, 18 *Serg. and Low.* 344. 2 *Saund. P. and Ev.* 651; and for the purpose of this point, the process may be considered,

as so far regular, as to have made it the duty of the sheriff to execute it. 1 *Archb.* 6, 284. *Shirley vs. Wright*, 2 *Ld. Raymond*, 775. 2 *Bac. Abr. title execution*, 709. 2. The *ca. sa.* should not have issued, until the previous process had been *finally* returned. *Wilson vs. Kingston*, 18 *Serg. and Low.* 307. A return by the sheriff in *vacation*, *before* the return day, cannot be a final return. The reason for the rule, that new process cannot issue until a preceding writ is finally returned, is, that the defendant may see, and object to the return, if there is ground for it. The purpose is to ascertain, if further process is necessary. It is not asserted, that a *ca. sa.* and *venditioni exponas*, can both be running at the same time, and yet in this case, the *test* day of both, is the same. At any time before the *return day* of the *venditioni exponas*, the sheriff might have changed his return, and therefore the return made upon it, when lodged in the office, in vacation, could not have been final, because then his control over it would have ceased. The *venditioni* was *returnable* process, and not returned. The case then, is one, in which an injury has been inflicted by process, maliciously set in motion by the defendant. On the face of the declaration, the arrest under the *ca. sa.* appears to have terminated. The writ being irregular, when the sheriff permitted the defendant to go at large, he was not bound to arrest him again. The arrest therefore had ended, and this appears upon the face of the declaration. It is no justification that the defendant acted by the advice of counsel if he was influenced by malice. *Ravenga vs. McIntosh*, 9 *Serg. and Low.* 225. *Hewlett vs. Cruchley*, 5 *Taunt.* 277.

BUCHANAN, Ch. J., delivered the opinion of the court.

Looking to the evidence in this case, it is perfectly clear, that the writ of *capias ad satisfaciendum*, on which the defendant in error is alleged to have been maliciously arrested, issued irregularly, and illegally. Where goods taken under a *fi. fa.* have been sold, for a part of the amount

due on the judgment, a *ca. sa.* cannot be legally issued for the residue, until the sheriff has made a final return of the *fi. fa.* showing what had been done with the property. For as the second writ is grounded on the first, and the return thereof, and must recite the proceedings thereon, the first must be returned before the second can issue. And it is proper and necessary to the security of the defendant, that it should be returned in term time, in order that he may have a day in court, to protect his rights. If it was otherwise, it would be in the power of a sheriff, or of a plaintiff by collusion with the sheriff, to practise great abuses. But when there is a return of the *fi. fa.* by which it is seen, what has been done with the property seized under it, there is something to control the sheriff, and to restrict the plaintiff to the amount for which he is entitled to have the body, by showing how much he has already received. A *fi. fa.* therefore, is always made returnable in term time, and cannot be otherwise legally returned. And if it be returned to the clerk's office, at any time during the recess, it is in law wholly void, and as no return, and a *ca. sa.* cannot legally be founded upon it. The same principle applies to a *venditioni exponas*, which was issued on a return by the sheriff, "that goods taken under a *fi. fa.* are on hand for the want of buyers." And the *ca. sa.* in this case was sued out, on a return of a *venditioni exponas* to the clerk's office, during the recess of the court, which the law did not authorise.

It has been urged at bar, that the action is misconceived, and should have been *trespass vi et armis* for false imprisonment. But we think there is nothing in that objection, and that the court below did right in refusing so to instruct the jury. If the plaintiff in the appeal, did maliciously *procure* the *ca. sa.* to be issued, and the defendant to be arrested under it, case, for such malicious arrest, is the appropriate remedy, the process issuing from a court of competent jurisdiction. It is not *res nova*. The principle upon which such actions are sustained, is a familiar one in

the books, and too well settled to require to be discussed here. But the foundation of the action being malice, and a want of reasonable or probable cause, which must be proved, and the fact of malice, being always a question for the jury, the instruction, that the *ca. sa.* issued irregularly and illegally, and that the “arrest of the defendant in the appeal under it, was a sufficient ground to support the present action,” was wrong, if the court intended to say, that the arrest alone, with or without malice, was sufficient to entitle him to recover; and also because it took from the jury the question of malice.

Malice may be, and most commonly is in such actions, implied from the want of reasonable or probable cause, that being first established. But the presumption of malice, resulting from the want of probable cause, is not conclusive, and the defendant, for the purpose of rebutting the inference of malice, for instance, as was attempted in this case, may be let in to show, that he acted under the advice of counsel; and whether he acted maliciously and for the purpose of oppression, or not, is a conclusion to be drawn by the jury from all the circumstances of the case. And if he can prove, or if it can fairly be inferred, from all the circumstances of the case, that he was not actuated by malice, or any improper motive, it will be an answer to the action; because it disproves that, which is of the essence of it, the malice, without which it cannot be supported. But in an action for a malicious prosecution, or a malicious arrest, as this is, it is not enough as has been supposed, for the defendant merely to show that he acted under professional advice, the want of probable cause having been first established. He may have done that, and believed that he acted legally, and yet have acted maliciously, and for the purpose of oppression. And having acted maliciously and oppressively, and without reasonable or probable cause, his belief alone, that he acted legally, will not support him in his malicious and oppressive violation of the law. However far his taking

professional advice, would go, if standing alone, to show the absence of malice, and a desire to act legally and correctly; yet it is evidence only to go to the jury for that purpose, and may be rebutted by other surrounding circumstances, the whole of which should go to the jury.

Evidence of the conduct, and declarations of the defendant, in relation to, and in the course of the transaction; of the situation of the parties; of the nature and extent of the injurious means resorted to by the defendant to effect his object, and of the forwardness, zeal, and activity manifested in the procurement, and use of the means employed, may properly be adduced to prove malice. And although, where a party has acted *bona fide*, and without malice, under professional advice and direction, which he believed to be sound, he is not liable, notwithstanding such advice was in fact incorrect, as malice express, or implied, must be proved—yet he cannot shelter himself under the direction and advice of counsel merely, against evidence of purposed malice, or from which malice may fairly be inferred. And whether he acted with a fair *bona fide* intention, or by what motive he was really actuated, is always a question purely for the consideration of the jury.

It is generally true, that in an action for a malicious prosecution, or a malicious arrest, malice, and the want of reasonable or probable cause, and also the determination of the prosecution, or of the suit, in which the writ was sued out, must be averred in the declaration, and proved at the trial. And it is objected that the defendant in the appeal, is not entitled to recover, under the declaration in this cause, there being no averment, either of the want of probable cause, or of the final disposition of the *ca. sa.* under which he is stated to have been arrested.

As respects the manner of declaring, it seems to us, that this is distinguishable from the case, either of an action for a malicious prosecution, or of the ordinary action for a malicious arrest. The reason why, in the former, the want of probable cause, and the determination of the prosecution must be averred, and proved, is, that otherwise the plaintiff

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might recover in the action, and yet be guilty, and afterwards be convicted of the original charge. And in the latter, that he might recover in the action for a malicious arrest, and yet the suit in which the writ was issued, under which he was arrested, be afterwards determined against him. And thus in either case, the actual existence of probable cause established, after a recovery against a defendant who was not in fault; and against whom there could only be a recovery, in the one case, on the ground that he had no probable cause for instituting the prosecution; and in the other, for instituting the suit. But if in this case, the *venditioni exponas*, and the irregular return of it to the clerk's office, during the recess of the court and out of term time, had been set out in the declaration, with the *capias ad satisfaciendum*, (founded upon that return and) issued before the return day of the *venditioni exponas*, under which the defendant in the appeal was arrested and put into prison—the reason requiring an averment of the want of probable cause, and of the determination of the prosecution in an action for a malicious prosecution, and of the determination of the suit in the ordinary action for a malicious arrest, would not have existed; the want of probable cause existing apart from, and not depending upon any disposition that might afterwards be made of the *ca. sa.*; and the law declaring that no *ca. sa.* can issue, before the regular and final return of the writ upon which it is founded: and the return of the *venditioni exponas*, and the recital of it in the *ca. sa.*, showing that there was no such legal return, and consequently that the *ca. sa.* was irregularly issued, and without any reasonable or probable cause. But the declaration not being so framed, and there being no averment of the want of probable cause, and of the final disposition of the *ca. sa.*, there is no cause of action shown in the declaration, on which the defendant in the appeal is entitled to recover.

It is not upon the evidence, but upon the pleadings and evidence applicable to the pleadings, that a plaintiff can recover in any case. It is therefore, always necessary,

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that the declaration should set out a good and sufficient cause of action, to be judged of by the court, otherwise it is in vain to look to the evidence in the cause, upon which there can be no recovery, without a case made in the declaration. This declaration sets out no such cause of action. It merely alleges the issuing of a *ca. sa.* and that the defendant in the appeal, was arrested under it. But it does not show any irregularity in the issuing of it, nor supply the defect, by averring the want of probable cause, and the final disposition of it. And for any thing appearing in the declaration, the *ca sa.* may have been regularly issued, and the defendant in the appeal properly arrested under it. And it is only by looking out of the declaration, to the evidence stated in the record, that any cause of action can be perceived. For which reason, and also because the court instructed the jury, that the arrest of the defendant in the appeal under the *ca. sa.* was a sufficient ground to support the present action, the judgment must be reversed.

JUDGMENT REVERSED, and the death of the appellee having been previously suggested, a procedendo was refused.

GREEN, Executrix of GREEN vs. JOHNSON, et ux.
December, 1831.

The inventory of a deceased testator's estate, and the accounts thereof, as filed in the Orphans Court by his executor, are admissible evidence in an action of *assumpsit*, brought by a child of the deceased, against the executrix of such executor; the latter having been the guardian of the child, and the object of the suit being to recover property of the ward, which he as guardian, was charged with having converted to his own use, and assumed to pay upon the liability resulting from the conversion.

To such an action, the act of limitations is a bar, after the lapse of time required by its provisions, there being no evidence to rebut it.

In a court of law there is no such head of pleading as trusts.

By the common law a *cestui que trust* has no standing in court, in *propria persona*, he can only assert his rights in a Court of Chancery.

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Courts of common law, to prevent fraud and injustice, will protect the rights of *cestui que trusts*; but this is done in the exercise of a *quasi* equitable jurisdiction, as where an appeal is made to the justice and discretion of the court, by way of motion, the matter whereof cannot be insisted on as a legal right, or presented in the form of a plea.

An action of account is the only action that can be brought against a guardian, *qua* guardian, in a court of law, other than an action on his bond.

Limitations apply to the action of account.

As soon as a trust ceases to be a continuing subsisting trust, or expires by its own limitation, or is put an end to by the act of the parties, if it be a fit subject for a suit at law, a cause of action arises, and the act of limitations begins to run.

The case of *Grant vs. Bell*, 4 *Harr. and McHen.* 419, overruled.

APPEAL from Charles County Court.

This was an action of *Assumpsit*, commenced by the appellees, *James Johnson*, and *Mary* his wife, (formerly *Mary Coomes*,) on the 17th August, 1826, against the appellant, *Elizabeth Green*, executrix of *James R. Green*, deceased, which said *James R. Green*, and *Teresa* his wife, also deceased, were the executors of *William Coomes*, the father of the appellee, *Mary*. The present action was brought to recover a sum of money, alleged to be due the appellee, *Mary*, from her guardian, the testator of the appellant, *J. R. G.*

The pleadings and evidence in the cause, are fully stated by the learned judge, who delivered the opinion of this court.

From the verdict and judgment of the County Court in favor of the plaintiffs, the defendant appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J., EARLE, ARCHER, and DORSEY, J.

Stonestreet, for the appellant, cited, 2 *Stark. Ev.* 900. *Bloodgood vs. Kane*, 7 *Johns. Ch. Rep.* 90.

C. Dorsey, and *Brawner*, for the appellees, cited *Kelly vs. Greenfield*, 2 *Harr. and McHen.* 144. *Grant vs. Bell*, 4 *Ib.* 419.

Green, Ex'tx of Green vs. Johnson, et ux.—1831.

DORSEY, J., delivered the opinion of the court.

The declaration in this case contains four *counts*. The *first*, for sundry matters properly chargeable in account. The *second*, for money paid, laid out and expended; for money lent, and advanced; for money had and received; and on an *insimul computassent* with the defendant's testator. The *third* count charges, that *James R. Green*, was appointed in 1804, guardian to *Mary*, one of the plaintiffs, and as such, possessed himself of all the personal estate of his ward, consisting of negroes, horses, and other stock; and received therefrom the increase, hires, issues, and profits of said property, amounting in the whole to the sum of \$2000. That not regarding his duty, he wholly refused to pay over this property, or any part thereof, but converted the same to his own use; by reason whereof, he became liable to pay, and being so liable, promised to pay the said sum of money when requested. The *fourth* is on an *insimul computassent* with the defendant as executrix. To this declaration, the defendant pleaded, *non assumpsit* by the testator; *non assumpsit* by the defendant's executrix; *non assumpsit infra tres annos* by the testator; and *non assumpsit infra tres annos*, by herself. Issues were joined on these pleas; and an account in bar was filed by the defendant, to which *non assumpsit*, and limitations being pleaded, issues were taken thereon. After the evidence had gone to the jury, consisting of the inventory of *William Coomes'* personal estate, appraised for distribution in 1805, and distributed accordingly at that time, the share of the plaintiff *Mary*, consisting of specifics, valued at \$585 41, and of the final account of *William Coomes'* estate, passed by the testator; and of his account as guardian to *Mary*, passed in December, 1809, shewing a balance of £231 7s. 5d. and of the proof that she arrived to the age of sixteen in October, 1809, and that she lived, during the years of 1810 and 1811, in the family of the testator; and that \$100 per year, was a reasonable charge for board during that period; which two years' board, formed one of the

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items in the account in bar ; the plaintiffs prayed the court to instruct the jury, that the defendant was not entitled to the allowance claimed for *Mary's* board, under the pleadings in this cause ; which instruction the court gave ; and in their doing so, we see nothing to disapprove. The defendant thereupon prayed the court to instruct the jury, that the plaintiffs were not entitled to recover in this action, if they should be of opinion from the evidence in this cause, that the cause of action had been more than three years standing, “ previous to the impetration of the original writ in this cause.” But the court were of opinion, and instructed the jury, that limitation was no bar to the recovery in this action. To which the defendant excepted.

The plaintiff having offered as evidence to the jury, the inventory of *William Coomes'* estate, and the several accounts passed with the Orphans Court by the testator, and *Teresa* his wife, executrix of *William Coomes*, the defendant objected to their admissibility. But the court, and we concur with them in opinion, overruled the objection. This forms the defendant's second exception.

In the third bill of exceptions, the defendant prayed the court to instruct the jury, that unless they should find from the testimony, that *James R. Green* or his executrix, made some assumption, or acknowledgement of the debt, within three years next before the impetration of the original writ in this cause, the plaintiffs were not entitled to recover. Which opinion the court refused to give ; and to such refusal the defendant excepted. Were the County Court right in refusing the defendant's prayers, in the first and third bills of exceptions, and in instructing the jury, “ that the act of limitations is no bar to the recovery of this action ? ” are the questions we are called on to consider.

To sustain the decision of the court below, it has been urged in the argument, that the defendant's testator, being the guardian of the plaintiff *Mary*, held the property for which this action was instituted as her trustee ; and that the statute of limitations presents no bar to a trust. But to this

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doctrine we cannot assent. If sitting as a Court of Equity it might deserve some consideration. But in the character in which we now sit, we know of no such head of pleading as trusts. By the common law, a *cestui que trust* has no standing in court, in *propria persona*; he can only assert his rights in a Court of Chancery. The plaintiffs, by insisting that the defendant stands to them in the relation of trustee, surrender their right of action, unless by some statutable provision they are made competent to enforce it. It is not pretended, that any such enactment exists. It is true that courts of common law, to prevent fraud and injustice, will protect the rights of *cestui que trusts*; but it is done in the exercise of a *quasi* equitable jurisdiction—where an appeal is made to the justice and discretion of the court, by way of motion, the matter whereof cannot be insisted on as a legal right, or presented in the form of a plea. Suppose that instead of taking issue on the plea of limitations, the plaintiffs had replied, that they ought not to be barred, &c. because the defendant was their trustee, &c. could such a replication, on demurrer, be sustained for a moment? For such a plea, as far as our researches have extended, no precedent can be found. But if the plaintiffs designed to sue in their character of *cestui que trusts*, they should have so presented their cause of action in the declaration, that the question on the plea of limitations, might have been met by a demurrer. Except the point arise on demurrer, that which can be relied on as a defence against the statute of limitations, must be pleaded in bar to its operation; and it is not admissible in evidence for that purpose, unless put in issue by the pleadings in the cause. To the first, second, and fourth counts, therefore, the plea of limitations is a conclusive bar. Is it not equally so, as to the third count? The defendant's testator is there charged, with having received the property of the plaintiff *Mary*, as her guardian, and converting the same to his own use, and in consideration thereof, promising the plaintiffs to pay them \$2000. What is it, that is sought to

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be recovered under this count? Is it the property which the guardian had been in possession of as a trustee? No—It is a sum of money, an equivalent therefor, which the guardian has promised to pay to the plaintiffs; and the payment of which vests in him, and those claiming under him, an indefeasible title to such property. With respect to the sum of money thus promised, can it be pretended that the testator held it as a trustee? Has it a single attribute of a trust? On the contrary, is it not a contract strictly legal, which can be sued on in a court of law, and no where else. To such a cause of action, the statute of limitations must be available as a bar.

But waiving all advantages which the pleadings of the plaintiffs, give to the defence taken by the defendant; and assuming that the present were an action of account, which is the only action other than one on his bond, that can be brought against a guardian, *qua* guardian, in a court of law; would the condition of the plaintiffs, as respects the plea of limitations, be changed for the better? In our opinion it would not. The act of assembly is explicit, is positive; it leaves nothing on the subject, on which conjecture or freedom of construction can operate. "All actions of account, shall be sued within three years, ensuing the cause thereof." It has justly been denominated "a statute of repose;" and is one of the most important, and beneficial legislative enactments which our statute book contains. This is not the epoch, when that salutary protection, which the legislature have wisely thrown around us, as a safeguard against fraud and oppression, should be frittered away by judicial refinements, and subtile exceptions that never entered into the contemplation of its enlightened framers. For many years it has been a subject of avowed and sincere regret, with the most distinguished judges, and eminent jurists of the age, that any constructive innovations were ever engrafted on this statute. We certainly are not disposed to increase the number of such interpolations.

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The cases met with in the books, which have given birth to the notion, that trusts form a new exception to the statute of limitations, warrant no such conclusion. The questions have been, not whether being within its letter, they were excluded by the spirit of the statute, and were therefore excepted from its operation, but whether they came within its letter. If *A* place merchandise in the hands of *B*, to be sold for the use of *A*, and *B* not selling, retain possession for seven years, when *A* demanding a return, and being refused, brings trover or replevin for the goods, the plea of limitations would be no bar to a recovery; because until the demand, he had no cause of action, and therefore the case is not within the letter of the statute. But if the demand and refusal, had been within one year after the delivery, then the plea of limitations would be a bar; a cause of action existing from the time of the demand, it is clearly within the express terms of the statute. As soon as a trust, ceases to be a continuing subsisting trust, or expires by its own limitation, or is put an end to by the act of the parties, if it be a fit subject for a suit at law, a cause of action arises, and the statute of limitations begins to run. The moment a ward is emancipated from the authority of his guardian, by reaching the age prescribed by law, his cause of action is complete. The relation which existed between them, ceases to be a subsisting trust: an action of account may be immediately instituted in a court of law, and from that time, the act of limitation dates the commencement of its operation. The saving in favor of infancy, gives to females after arriving at the age of twenty-one years, the same time for the assertion of their rights, that is allowed to the other sex.

Should the doctrine which prevailed in the court below be sustained, what prudent man would consent to be a guardian? His accountability would know no termination. Fifty years after the deaths of both guardian and ward, the representatives of the latter might sue those of the former, in a court of law, and require proof as to the mode, in which

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the property of the ward had been managed, and paid over ; and the statute of limitations would afford no protection. By the restriction which we have deemed applicable to the rights of the ward, he is subjected to no inconvenience or injury. The same measure of justice which is extended to every other adult in the community, is conceded to him; and he has other remedies, and three distinct tribunals, where ample justice can be obtained. If by his unreasonable *laches* in regard to time, he does not forfeit all claim to redress, he can obtain full relief by proceeding against his guardian, in the Orphans Court ; or by suit on his guardian's bond in a court of law ; or by calling on him to account for his stewardship in a Court of Chancery.

If however, in a proper state of pleadings to raise the question, the pleas of limitation would form no bar to the plaintiff's right of recovery in this action, were the court under the issues joined in the cause, justified in refusing the defendant's prayers, in the first and third bills of exceptions ? Had the plaintiff designed to urge this objection to the pleas, he ought either to have demurred to them, or if allowable in pleading, by his replication to have set out the matter of avoidance, by which he sought to evade the operation of the bar. Instead of doing this, he took issue on the pleas, and thereby admitted their legal sufficiency, and applicability. The question then for the determination of the jury, was the truth of those pleas. With their effect they had nothing to do. The plaintiffs had confessed upon the record, that if true, the jury must find a verdict against them. The instructions asked for, were of nothing more than was admitted on the record ; and consequently the court were bound to have given them. By the instruction which was given, the jury were in effect, directed, that although they should find the facts in issue, in favor of the defendants, yet, that they were bound to render their verdict for the plaintiffs.

The only case we have met with appearing at all to conflict with any of the views we have taken of the case be-

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fore us, is that of *Grant vs. Bell*, 4 Harr. and McHen. 419, decided by the late General Court, at October term, 1799. The plaintiff there having brought an action for money had and received, to which *non assumpsit* and limitations were pleaded, “gave evidence to the jury, that the defendant as his agent, had received the sum of £78 for the rent of certain lands belonging to the plaintiff, and which the defendant had rented out for him. The defendant then proved that £40 14s. part of the said sum of £78 had been received more than three years before the action was commenced; and thereupon prayed the court’s instruction that the plaintiff could only recover, what was received within the last three years. But the court were of opinion that the statute of limitations was no bar to any part of the plaintiff’s claim. For this laconic opinion no reasons are assigned. If, as has been contended for in the argument, the General Court regarded this case as a case of trust, and therefore, not within the spirit of the statute, they would have so stated; and not left this opinion of less than three lines, to rest, as to the principle on which it turned, on vague conjecture. If, as is more probable they regarded *Bell* as holding this money under a continuing trust, and that he was not bound to pay it over without delay, we cannot concur with them in opinion. There is nothing to shew that it was the intention of *Grant* and *Bell*, that the latter should keep possession of the money received, for the purpose of investment, or any other appropriation. On the contrary, we conceive that there was an implied engagement, a legal obligation on the part of *Bell*, when a payment was made to him, without delay to pay it over to *Grant*, and not retain it in his hands without object. That having failed to do this, *Grant* had an immediate right of action against him; and that there was nothing in the relative situation of the parties, which could postpone the operation of the act of limitations. We do not therefore, hold ourselves bound by the authority of that case, even admitting that its cir-

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cumstances were more analogous to those of the case at bar, than they appear to be.

We concur with the County Court in their opinion in the second bill of exceptions; but dissenting from their opinion, and refusal of the defendant's prayers, in the first and third bills of exceptions, we reverse their judgment.

JUDGMENT REVERSED, WITHOUT PROCEDENDO.

COWMAN, *et al.* vs. SARAH HALL—GLENN, Adm'r of HALL vs. SARAH HALL.—December, 1831.

H, in 1789, and in consideration that his mother would pay him £100 over his part of his father's personal estate, and all the debts due from her deceased husband, and also procure H a conveyance in fee of certain lands, agreed with her, as a provision for the younger children of the family, to convey to her or her heirs, or to such of the younger children and their heirs, as she should from time to time appoint, certain other lands of which he was seised. A few days after this, H married. Upon a bill filed in 1826, by his widow for dower, it appeared, that the mother in 1789, went into the possession of the land which H had agreed to convey—that in 1807, H uniting with his mother, executed deeds for this land to the defendants, and that the deeds with the agreement were put on record at the same time—**HELD**, that it appeared that the mother had complied with her part of the agreement, and was entitled to the conveyances from H, clear of any claim for dower on the part of his widow.

A widow is not dowable in equity of lands which were held by her husband in the character of trustee.

Where a bill for dower alleged that the complainant's marriage with her deceased husband took place "on or about the year seventeen hundred and —," and called upon the defendant to answer whether "she was not married as stated." And the answer after setting out an agreement of the 14th January, 1789, alleged that "the marriage took place some time after that agreement," it was **HELD**, that this allegation, both as respects the fact and time of marriage, was responsive to the bill, and must stand as conclusive of those facts, not being contradicted by any evidence.

APPEAL from the Court of Chancery.

On the 11th of August, 1826, the appellee filed her bill, against *Henrietta Hall*, since deceased, alleging, that on or about the year seventeen hundred and — she intermarried with a certain *Richard Hall of Edward*, who at the time of said intermarriage was seised in fee, of certain lands in *Anne Arundel* county, described in exhibits A and B, filed with, and made parts of her bill. That she thus became entitled to dower in said lands, upon the death of her husband, who departed this life, on or about the — day of January, 1823; she never having in any way relinquished her dower in the same. That the said *Henrietta Hall*, as devisee of one *Edward Hall*, (since dead) named in exhibits A and B, is, and for some time past, has been in possession of said lands, claiming them under the said *Edward* in fee; and refuses to assign the complainant her dower therein, and to pay her, her proportion of the rents and profits thereof. The bill then prays that the defendant may answer the premises, as if particularly interrogated, and especially whether the complainant was not married to the said *Richard Hall of Edward* as stated, &c. That her dower may be assigned her by the court, and the defendant be decreed to pay her proportion of the rents and profits of the land.

The *Answer of Henrietta Hall*, admits the death of *Richard Hall of Edward*, and his marriage with the complainant; and says that on or about the 14th of January, 1789, the said *Richard Hall of Edward*, and a certain *Martha Hall*, entered into articles of agreement, (referred to, as exhibit A, in another cause then depending in the Court of Chancery) by which it was stipulated between the parties, that said *Martha* was to pay him, the said *Richard*, the sum of £100, over and above his part of his father's personal estate; to pay all debts due from said estate, and to procure him the said *Richard*, and his heirs, a conveyance in fee simple, for certain lands purchased of *Thomas H. Hall*, and to deliver him *Richard*, the immediate possession thereof,

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&c. Then the said *Richard*, in consideration thereof, and as a provision for the younger children of the family, agreed to convey to the said *Martha* and her heirs, or to such of the younger children, brothers or sisters to the said *Richard*, as the said *Martha* should, from time to time direct and appoint, sundry lands in such agreement mentioned, &c. The answer further states, that the said *Martha* faithfully performed her part of the said agreement, and that in compliance therewith, and by the direction and appointment of the said *Martha*, the deeds in complainant's bill referred to, were executed by her, the said *Martha Hall*, and the said *Richard Hall* of *Edward*, to the said *Edward Hall*, the son of the said respondent, and younger brother of the said *Richard Hall* of *Edward*. The answer then alleges, that the complainant was married to her aforesaid husband, some time after the said agreement was executed.

Exhibits A and *B* were certified copies of deeds recorded in the office of the clerk of *Anne Arundel* county, both bearing date on the 13th day of July, 1807, from *Martha Hall* and *Richard Hall*, to *Edward Hall*, younger brother to said *Richard*, the first containing 250 acres of land, described by metes, and bounds, courses and distances; the second conveying a tract or parcel of land called *Chancey's Resolution*, containing 400 acres, and a parcel of land containing 25 acres, called *Wades' Increase*.

The *exhibit* filed in the case against *Glenn*, adm'r of *Hall* and *Julius Hall*, was a similar deed from the same parties, dated on the same day, conveying to *Thomas W. Hall* and *John Hall*, also younger brothers of *Richard Hall*, several other tracts of land called, *Maddox's Adventures*, *Arnold Grey*, *Happy Choice*, and other adjacent tracts. This latter bill was for dower in those lands, and the pleadings and proofs in both cases were the same.

Upon the death of *Henrietta Hall*, the proceedings were revived against her representatives, the present appellants.

Commissions issued to take testimony, under one of which the following agreement referred to in the answer of *Henrietta Hall*, was proved and returned.

“*Mem.* of agreement made this 14th day of January, 1789, between *Richard Hall*, son of *Edward*, of *Anne Arundel* county, in the state of *Maryland*, gentleman, of the one part, and *Martha Hall* of the same county and state, widow of the said *Edward*, of the other part, witnesseth, that the said *Richard Hall*, for and in consideration that the said *Martha* hath agreed to pay him one hundred pounds, current money, over and above his part of his father's personal estate; and hath agreed to pay all the debts due from her deceased husband, and hath also agreed to procure him the said *Richard* and his heirs, a conveyance in fee simple, for all the lands purchased of *Thomas H. Hall*, and to deliver him immediate possession thereof, &c. The said *Richard Hall*, in consideration thereof and as a provision for the younger children of the family, hath agreed, and doth hereby bind, and oblige himself and his heirs, to convey to her, the said *Martha Hall*, or to her heirs or to such of the younger children, brothers or sisters to the said *Richard*, as she shall from time to time direct and appoint, and to their respective heirs, in fee simple, all the following lands, that is to say; all the lands purchased of *Benjamin Welch*, also all the lands purchased of *William Hall*, also all the lands purchased of *William Ijams*, and all the lands heretofore deeded by *Henry Hall*, deceased, to the said *Edward*, except the *wood land* above reserved, together with all the improvements, &c. The same conveyance to be made either in separate deeds or otherwise, at the will, and according to the directions of the said *Martha*, from time to time, or at any time when by her required. And if no such direction in her life-time, then agreeably to such disposition as she shall make thereof, amongst the said children, by her last will and testament. It is to be observed, that this agreement in no wise obligates the above named *Richard*, to defend any of the lands by him to be deeded, against any person or persons, but those who claim immediately from, by, or under him. In testimony whereof, we

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have hereunto set our hands and seals, the day and year first above written.”

The above agreement was recorded among the land records of *Anne Arundel* county, on the same day with complainant's exhibits A and B. There was evidence taken under the commission, that all the lands in complainant's exhibit A, are mentioned in the preceding agreement—the agreement, however, does not embrace the tract called *Wade's Increase*, conveyed by exhibit B.

It appeared by accounts settled in the Orphans Court, that *Martha Hall* had overpaid the personal estate of her husband.

Bland, Chancellor, at September term, 1829, decreed, that the plaintiff *Sarah Hall*, is entitled to dower in all the lands and tenements in the proceedings mentioned; and directed a commission to issue for the purpose of making an assignment to her of her dower therein. And ordered an account to be taken by the auditor of the amount of the rents and profits, to which she may be entitled, from the period when her right to dower accrued. From this decree the defendants appealed to the Court of Appeals.

These causes were argued before BUCHANAN, Ch. J., EARLE, ARCHER, and DORSEY, J.

Johnson, for the appellants contended,

That the lands in which the complainant is allowed her dower, were, on the 14th of January, 1789, before her marriage with her deceased husband, contracted by him, with those under whom the appellants claim, to be sold for a valuable consideration, as appears by defendant's exhibit A. The complainant, he argued, had sought relief in a Court of Equity, and she must therefore be dealt with according to the principles which govern that court. One of the leading principles of the court is, to consider as actually done, that which ought to be done. The case of *Dimond's Adr'x vs. Billingslea, 2 Harr. and Gill, 264*, decides, tha

an equitable right to dower, will be defeated by a previous contract to convey.

If the contract of 1789 was previous to the marriage of the complainant to her husband, then *Richard Hall* became a trustee of the lands therein mentioned, for the benefit of his mother *Martha*. A Court of Chancery would have compelled *Richard Hall* to fulfil his part of this contract; but he has fulfilled it by the execution of the deeds of 1807. That those deeds were designed as an execution of the contract of 1789, is evident from the circumstance of *Martha* being a grantor in them. If they had no connexion with that contract, why should she unite in them?

The fact that the contract was recorded together with the deeds, clearly shows that the parties supposed, and intended the latter, as an execution of the former. He insisted that the answer was evidence of the time of complainant's marriage, as being responsive to the bill. There is no proof of a marriage at all, except in the answer, which must be as competent to prove *the time*, as the fact. He admitted that a deed executed upon the eve of marriage without consideration would be void, but that is not the case here. The consideration was a valuable one.

A. C. Magruder, and *Murray*, for the appellee.

The fact of the marriage, and the seizin of *Richard Hall* is admitted, and it is not shown that the contract of 1789 was anterior to it. But if it was, they insisted that a Court of Chancery would not now enforce it specifically. The marriage certainly took place some time in 1789, and he lived until 1823. The deeds were not executed until 1807, so that the contract was dormant for 18 years. Such an agreement cannot be set up against the title of the widow, who is a purchaser for a valuable consideration. The deeds do not appear upon their face, to be in execution of the agreement of 1789; nor is there any evidence to show them to have been so. Suppose a bill had been filed on this contract, limitations would have been a bar to any

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relief. A specific performance will not be decreed, upon a contract which has lain dormant for many years. 2 *Eq. Cases*, 19. *Arden vs. Arden*, 1 *Johns. Ch. R.* 313. If the agreement was prior to the marriage, it was but a very short time before, and is fraudulent and void as against the wife. *Swaine vs. Perine*, 5 *Johns. Ch. R.* 482. All knowledge of the contract was kept from the wife, from the time of its execution until it was recorded with the deeds of 1807, and as it was a paper not required to be recorded, she was not bound to take notice of it. A secret contract cannot be set up to defeat dower.

BUCHANAN, Ch. J., delivered the opinion of the court.

Under the agreement of the 14th January, 1789, between *Richard Hall*, the deceased husband of the complainant, *Sarah Hall*, and his mother, *Martha Hall*, by which, for the consideration expressed, he contracted to convey to her in fee, or to such of her younger children, his brothers or sisters in fee, as she should direct, the lands therein mentioned, he became in equity a trustee for his mother, of all the lands embraced by that agreement. And the circumstance of that agreement, and the three deeds of the 13th July, 1807, from him and his mother *Martha*, for the same lands, two of them to *Edward Hall*, and the other to *Thomas W. Hall*, and *John Hall* his brothers, and the children of *Martha*, all standing recorded on the same day, and immediately following each other in the same book, together with the deeds being to three of the younger children, for whose benefit the agreement was entered into, and their mother having joined in the deeds, to whom, or to whose appointment the lands were contracted to be conveyed, shows satisfactorily, that *Martha Hall* had complied with the terms of the agreement on her part, and entitled herself to a compliance on the part of *Richard Hall*, and that the deeds were made in pursuance of that contract. For what other purpose could the agreement have been recorded with the deeds, (not being an instrument required by law

to be recorded,) than to show the inducement to the deeds, and that it had been complied with? And the additional fact appearing in evidence, that the lands covered by the agreement of the 14th January, 1789, were from the time of the execution of that instrument in the possession of *Martha Hall*, and never from that day in the possession of *Richard Hall*, is worthy of notice, and assists in leading to the conclusion, that she had performed all that was required of her to be performed, and had thereby entitled herself to a conveyance, in pursuance of the agreement, whenever she might choose to require it. Or why was she permitted to remain in the undisturbed possession and enjoyment of the premises? which is not accounted for in any other way, and as far as appears from this record, can only be accounted for on the ground that she was entitled to the beneficial interest. The lands were by the contract, to be conveyed to herself, or to such of her younger children, sons or daughters, as she should from time to time direct; and her uniting in the deeds to her three younger sons was a good appointment, and equivalent to a direction to *Richard Hall* to convey to them, at a time selected by herself, and which by the agreement she had a right to select, and when she thought proper to give them the property, and to cause the conveyances to be made. And it may be, that the deeds were not executed sooner, because she did not deem it proper or expedient to have it sooner done.

A widow is not dowable in equity of lands, which were held by her husband in the character of a trustee; and as the complainant seeks to be endowed of lands, embraced by the agreement between her husband and his mother *Martha Hall*, of the 14th January, 1789, of which he, on that day became a trustee for his mother, her right to recover must depend on the time of their marriage; and be determined according to the fact of the marriage having taken place, before, or subsequent to the execution of that instrument, as shown in the record.

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In her bill, she alleges that it took place "on or about the year seventeen hundred and" *blank*, and calls upon the defendant to answer, whether, "she was not married as stated." Not confining the interrogatory to the fact of marriage alone, but requiring a response, as well in relation to the time, as to the fact of marriage. And the answer setting out the agreement of the 14th January, 1789, which is stated to have been faithfully performed, denies the complainant's title to dower, and alleges that the marriage took place some time after that agreement was executed, that is, sometime after the 14th January, 1789, which allegation, both as respects the fact, and time of the marriage, is responsive to the bill, and is not contradicted by a single witness in the cause. On the contrary, the evidence of the only two witnesses who gave testimony upon that subject, so far from contradicting, is perfectly consistent with the answer, and goes to support it. They swear that they were married themselves on the 18th of December, 1788, and that the complainant, and her deceased husband, *Richard Hall*, were married about one month afterwards, reaching a few days beyond the 14th January, 1789, the date of the agreement, when *Richard Hall* stood seized of the lands, in which she claims to be entitled to dower, as trustee for his mother. But the answer alleging the marriage to have been after the date of the agreement, does not require the aid of that testimony to support it; but being responsive to the bill, and not contradicted, or shaken by any other evidence, must stand, as conclusive of the fact it asserts, that is, that the marriage was after the execution of the agreement of the 14th January, 1789. We are consequently constrained to say, that the complainant is not entitled to dower, in any of the lands embraced by that instrument, and of which her deceased husband, was at the time of their marriage, and afterwards seized only as trustee. But the land described in the deed from *Martha Hall* and *Richard Hall*, to *Edward Hall*, marked exhibit B, as "part of a tract of land called *Wade's*

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Increase," containing about twenty-five acres, not being embraced in the agreement of the 14th January, 1789, and of which *Richard Hall* was beneficially seized, during his coverture with the complainant, and not as trustee, she is entitled to dower in that land.

The decree of the chancellor therefore, must be reversed with costs, so far as it relates to the lands embraced by the agreement of the 14th January, 1789, between *Richard Hall* and *Martha Hall*; and the complainant will be decreed to have her dower, in the other parcel of land described in the exhibit B, as "part of a tract of land called *Wade's Increase*."

With respect to the case of *Glenn*, adm'r of *Thomas W. Hall*, and *Julius Hall vs. Sarah Hall*, which has been submitted to us on the same pleadings and evidence, the whole of the land in which dower is claimed, being embraced by the agreement between *Richard Hall* and *Martha Hall*, of the 14th January, 1789, and consequently, held by *Richard Hall*, at the time of his marriage to the defendant in the appeal, and afterwards, as a trustee only for his mother, the defendant is not entitled to dower in any part of it, and the decree of the chancellor must be reversed, and the bill dismissed with costs.

DECREE. It was thereupon adjudged, &c. by the Court of Appeals, that the decree of the chancellor in the case of *Joseph E. Cowman, et al. vs. Sarah Hall*, be reversed, with costs to the appellants in this court, and the Court of Chancery. But it appearing to this court, that the appellee is entitled to dower in the land described in exhibit B, as part of a tract of land called *Wade's Increase*, it was therefore, further adjudged, ordered, and decreed, that the record in this case, be remanded to the Chancery Court, and that the said court pass such order, and decree therein, as may be necessary to assign dower to the appellee in the said land, with such rents and profits accruing out of said land as she may be entitled to.

DECREE REVERSED.

NATHAN WATERS vs. SAMUEL PEACH.—December, 1831.

In March, 1825, a writ of *fi. fa.* was sued out, which the sheriff returned at the return day. In July, a *vend*i issued founded upon that return; this being returned and not executed, another *vend*i was issued, which was returned to April term, 1827, executed, and the proceeds of the property sold, paid to plaintiff's attorney. At April term, 1828, the defendant in the execution, moved to quash the last *vend*i, and the return thereto, for various alleged irregularities. HELD, that the motion not being made at the return term of the writ, nor while the proceedings were in *feri*, was too late.

APPEAL from Prince George's County Court.

On the 10th March, 1825, a *feri facias* issued out of Prince George's County Court, on a judgment rendered in that court, in favor of the appellee against the appellant. At the return day of the writ, the sheriff returned it—"laid as per schedule and paid \$574 09. Not sold for want of bidders." On the 13th of July, 1825, a writ of *venditioni exponas* issued, commanding the sheriff to expose to sale one tract of land called *Pasture Enlarged*, 200 acres: one ditto *Osbourne's Lot*, and part of *Pleasant Grove*, 52 acres: part of *Duwall's Pleasure*, 150 acres: part of *Tukesbury*, 50 acres: part of *Tukesbury* and *Walker's Delight*, 150: part of a tract of land called *Friendship*, 180 acres: which were stated to have been seized and taken by the said sheriff, under the said writ of *feri facias*. This writ of *venditioni exponas* being returned, "not sold for want of bidders," another writ issued for the same purpose, on the 4th of December, 1826, returnable to April term, 1827. To this writ, the sheriff at the return term made the following return:—"made by a sale to Doctor Charles Duwall, on the 30th day of December, 1826, of all the interest of the defendant, in and to the following parcels of land, to wit:—one tract of land called *Pasture Enlarged*, containing 200 acres more or less, one tract of land called *Osbourne's Lot*, and part of *Pleasant Grove*, containing 52 acres more or less: one tract of land

called *Duvall's Pleasure*, or *part of Duvall's Pleasure*, containing 150 acres more or less: one tract of land called *Tukesbury*, and a part of *Tukesbury* and *Walker's Delight*, containing 150 acres more or less; and a tract of land called *Friendship*, containing 180 acres, the sum of \$1350, which has been paid to me by the said *Charles Duvall*, and by me paid to plaintiff's attorney. *George Simms*, sheriff." And the sheriff on the day of the return of the said writ, filed in court with his said return, the following schedule, to wit:—"A schedule of the property of *Nathan Waters*, taken in execution at the suit of *Samuel Peach*, issued from *Prince Georges County Court*,—all his right, title and interest, in the following tracts, or parcels of land, to wit: a tract of land called *Pasture Enlarged*, containing 200 acres; one do, called *Osbourne's Lot*, and *part of Pleasant Grove*, containing 52 acres; *part of Duvall's Pleasure*, containing 150 acres; part of a tract of land called *Tukesbury*, and *part of Tukesbury* and *Walker's Delight*, 150 acres; and a tract of land called *Friendship*, containing 180 acres, more or less; and valued by the undersigned at \$5 per acre, this 30th day of December, 1826." Afterwards, at April term, 1828, the defendant, in the execution named, (the present appellant,) moved to quash the last of the said writs of *venditioni exponas*, and the return thereto, for the following reasons. 1. Because the *sheriff* has returned to the *fi. fa.* issued in this cause, "levied as per schedule," and no schedule appears to have been returned. 2. Because it does not appear from the said return, that any levy was made before the return day of the *fi. fa.* 3. Because the *venditioni exponas*, under which the sale was made, was a renewal of a previous writ; and said *venditioni exponas*, and return thereto, are variant from the first writ. 4. Because the said writ was irregularly issued. 5. Because the description of the property directed to be sold, is uncertain. 6. Because the description of the property as set out in the advertisement of sale, and sheriff's return, is uncertain. 7. Because the

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said return is irregular, informal, uncertain and void. The County Court overruled the motion. From this decision the defendant appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J., EARLE, and ARCHER, J.

Alexander and Stonestreet, for the appellant, contended,

1. That it does not appear that the writ of *fieri facias* was tested in term, as it should have been. 2 *Tidd. Pr.* 914. *Shirly vs. Wright*, 2 *Salk.* 700. 1 *Sellon*, 520. 2. That the return thereto is void. 3. The original *venditioni exponas* was not warranted by the writ of *fi. fa.* and the return is uncertain upon its face, and the return thereto is also defective. *Shirly vs. Wright*, 2 *Salk.* 699. 2 *Tidd's Pr.* 931. 1 *Sellon*, 520. *Thomas vs. Turvey*, 1 *Harr. and Gill*, 435. *Purl vs. Duvall*, 5 *Harr. and Johns.* 69. 4. The alias *venditioni exponas* was irregularly issued, and is variant from the original. 5. That the sheriff's return to the last writ is defective, because the sale made by the sheriff, was not made in due form of law; and because it appears that the lands supposed to be sold, are different lands from those which are mentioned in the *alias* writ, and which by said writ, he was authorised, and commanded to sell.

They argued that the motion did not come too late, and for that purpose cited, 4 *Harr. and McHen.* 291. *Harden and Carson vs. Moores*, 7 *Harr. and Johns.* 4. *Williamson vs. Perkins*, 1 *Harr. and Johns.* 449. 2 *Saund. Rep.* 68. *F.* note 2, and 69. *C.* note 3.

Magruder and Johnson, for the appellee.

The objections so far as they relate to mere matters of form, are waived, by the delay in making the motion to set the proceedings aside. *Fletcher vs. Wells*, 1 *Serg. and Low*, 352. If a writ is taken out in term, it must be tested on the first day of the term; if in vacation, on the last day

of the preceding term. *Arch. Pr.* 284, 297. A return void in part, may be good for the residue, *Hollingsworth vs. Floyd, et al.* 2 *Harr. and Gill*, 87. 2 *Caine's Rep.* 354. If therefore, the court should be of opinion, that the return is imperfect in reference to some of the parcels of land, it is certainly good as to others, and consequently, the whole is not to be set aside. The defects however, were all amendable, and upon the authority of *Fletcher and Wells*, the motion comes too late, 1 *Archbold*, 284, 279. *Berry vs. Griffith*, 2 *Harr. and Gill*, 337. The return to the second *venditioni exponas* is specific, and as all the writs and returns prior to the sale are but one proceeding, the defects of the former, are cured by the latter, *Clark vs. Belmear*, 1 *Gill and Johns*. 445. They insisted that sales made under judicial process, are considered as made under the authority of the court, and as sales *nisi*. If the defendant intends to object, he should do so at the return term of the writ, when the money is in the power of the court, and may be refunded to the purchaser. To this proceeding the purchaser is no party,—none are parties but the defendant, and the plaintiff in the judgment, having received his money, may not choose to concern himself with such a motion. If objections like the present, can be made at a distant day, purchasers would never know when their titles would be secure. The only person entitled to complain of the irregularity of these proceedings, if they are so in fact, is the purchaser,—if he is willing to trust his money and title upon them, what right has the defendant to urge objections?

ARCHER, J., delivered the opinion of the court.

Entertaining the views which we do, in relation to the time at which the motion to *quash* the *venditioni exponas*, and sheriff's return has been made, we do not deem it necessary to express any opinion in relation to the various defects which have been insisted to exist, in the *feri facias*, *venditioni*, *alias venditioni*, and the sheriff's returns

thereto. Had the defendant appeared at the term to which the *alias* writ of *venditioni exponas* was returnable, and when the proceedings were in *fieri*, and made his motion to quash them, the regularity and legality of the proceedings would have properly come up for adjudication. But after the term has passed by, when the parties have no day in court, and the purchaser has paid the purchase money, which has actually passed to the credit of the judgment against the defendant, we apprehend it is too late, for the defendant, in this summary way, to make his motion to set aside the proceedings as irregular, and that too, without a rule to show cause, either against the plaintiff, or the purchaser, why the proceedings should not be quashed. The authorities cited from 4 *Harr. and McHen.* 291. *Williamson vs. Perkins*, 1 *Harr. and Johns.* 449, and *Harden and Carson vs. Moores*, 7 *Ib.* 4, do not appear to establish the positions for which they were cited. The motions to quash, were in all those cases made, while the proceedings were pending in court, or at the term to which they were returnable. We have been referred to 2 *Saund.* 69, note 3, to show, that if an inquisition upon an *elegit* be void for uncertainty, or because more than a moiety of the lands have been delivered, or for any other defect appearing on the face of it, as the plaintiff can never obtain possession of the lands under it, the court upon a *scire facias* will order the writ to be vacated: and it has been emphatically asked, if the proceedings may after the term, be vacated upon a *scire facias*; why may they not upon motion? The answer is obvious; because in the latter case, after the term, the parties have no day in court; but upon the former, a day is given.

But why should the court be called upon at this time, to set aside these proceedings? The purchaser, who is the only person likely to be affected by their illegality, if in fact they be so, (and whether they be, or be not so, we do not mean to intimate any opinion,) is willing to stand by the proceedings, and to rest his title upon them. There exists

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no intimation, that by the course adopted by the sheriff in the execution of the writs, any injustice has been done to the defendant. There is certainly no evidence to that effect, and we conceive that such efforts to harrass the purchaser, do not merit the encouragement of the court.

JUDGMENT AFFIRMED.

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December, 1831.

W, by his last will devised as follows: "I give and bequeath to my daughter A, the sum of \$60, as an annuity, to be paid to her out of the profits of my real estate annually." This is an annuity, and not a rent charge.

This annuity being in arrear, the devisee filed her bill against the infant devisees of the land, their guardian, and the personal representative of the testator, alleging the annuity to be a charge on the land and its profits, and praying for an account—that the lands may be sold,—the proceeds applied to the payment of the annuity, so far as necessary, and the balance invested to meet future instalments, and for general relief. HELD, that as the bill contained no allegation or suggestion of the receipt of the rents and profits by the defendants, or any of them, nor of the annual value of the land, nor of the application of the rents and profits, and did not call upon the defendants to make any disclosures upon these subjects, there was no issue, to which evidence, which had been taken in the cause in relation to them, could apply, and that there could be no decree *in personam* against the defendants, under this state of the pleadings.

The neglect of a defendant to answer a bill, upon which a decree *pro confesso* is passed, amounts to an admission only of the allegations in the bill.

The answer of infant defendants, calling upon the complainants to prove the bill, only puts them to the proof of what is charged, and entitles them only to a decree on the case made in the bill, when proved.

APPEAL from Chancery.

On the 17th August, 1826, a bill was filed by the appellees, *Perry Townshend* and *Anne Maria*, his wife, formerly *Anne Maria Duncan*, against the appellants, *Joseph Rob-*

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inson, *William J. B. Duncan, Caroline Duncan*, and *Thomas Iglehart*, administrator *d. b. n.* of *William Duncan*, deceased. Upon the death of *Thomas*, after the commencement of the suit, *John Iglehart*, who took out letters of administration, *d. b. n.* on *W. Duncan's* estate, was made a defendant in his stead. The bill alleges that the late *William Duncan*, the father of the complainant *Anne Maria*, died about the 25th March, 1819, having first duly made and published his last will and testament, and leaving the complainant *Anne Maria*, his only issue, by a first marriage, and two children, *William J. B. Duncan*, and *Caroline Duncan*, both then and still minors, the issue of a second marriage, and a widow *Deborah*, whom he constituted the sole executrix of his will. That by said will the testator devised his real estate, lying in *Anne Arundel* county, to *William J. B. Duncan* and *Caroline Duncan*, as joint tenants; and gave to the complainant *Anne Maria*, an annuity chargeable thereon, of sixty dollars a year, as appears by said will, exhibited and made part of the bill. That said *Deborah*, the executrix, before her death, paid complainant *Anne Maria*, but one year's annuity, and that *Joseph Robinson*, (one of the appellants,) who has been appointed by the proper authority, and now is guardian to the aforesaid infants, has also paid but for one year, and that he, the infants, and *Iglehart* the adm'r *d. b. n.*, all refuse to pay any thing more, on account thereof. That said annuity is now in arrear for several years, and inasmuch as the same is made a charge on the lands mentioned in the will, and the profits thereof; *prayer*, that an account may be taken, that the said land may be sold, and the proceeds be applied to the payment of said annuity, as far as may be necessary, and the balance invested, to meet future instalments thereof, and for general relief.

The will of *William Duncan*, dated 26th December, 1818, and proved on the 30th March, 1819, exhibited with the bill, contained the following provisions: "I give and devise unto my daughter *Caroline Duncan*, and my son

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William J. B. Duncan, the plantation on which I now dwell, consisting of several tracts, or parts of tracts of land, called, &c. being contiguous to each other, and containing in the whole 229½ acres, between them, share and share alike, as joint tenants, and not tenants in common." "*Item*, I give and bequeath to my daughter *Anne Maria Duncan*, the sum of \$60 current money, as an annuity, to be paid to her out of the profits of my real estate above mentioned, annually, for and during the term of her natural life, withholding from her however, the power of selling, or transferring the above mentioned annual allowance, to any person or persons whatever, under penalty of forfeiture."

The infants, *Wm. J. B. Duncan*, and *Caroline Duncan*, by the guardian, answered, saying, they know nothing of the matters alleged in the bill, and put the complainants to the proof of them.

The other defendants did not answer. And after an interlocutory decree against them, the case was referred to the auditor, with directions to report to the chancellor, the whole value of the lands in the proceedings mentioned, the annual value thereof, since the death of the testator; and by whom, if by any one, the rents and profits have been received, and the amount thereof; the amount of the arrearages of the annuity with interest, and the age, and general state of health of the plaintiff, *Anne Maria Townshend*, from the proceedings, and such proofs as may be laid before him. And the parties were permitted to take the depositions of witnesses before a justice of the peace, on giving three days' notice, as usual to the opposite party, or his solicitor. In obedience to this order, the auditor took proof, touching the several matters thus referred to him and on the 13th August, 1829, reported on account, charging *Deborah Duncan*, with the annuity to the complainant *Anne Maria*, from the 4th March, 1820, to 4th October, 1824, (when she died) amounting, with interest to the date of the report to \$354 16; and charging *Joseph Robinson* with the arrearages which accrued after the death of said

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Deborah. There were also some depositions relating to the same matters, taken before a justice of the peace, agreeably to the above order.

The defendants excepted to the report of the auditor, upon the ground, among others, “that there was no evidence in the cause duly and regularly taken, according to the course of chancery proceedings, by which the defendants can in any wise be charged or affected, or any decree passed against the infant defendants, touching, or concerning the interests of said infants, or said *Robinson*, in the land, in the bill mentioned, or otherwise.

BLAND, Chancellor, August 17th, 1829.

This cause standing ready for hearing, and having been submitted on the notes of the solicitors of the parties, the proceedings were read and considered.

William Duncan, having a wife and three children, and being possessed of some personal property, and seised of a tract of land containing about 229 acres, on the 26th of December, 1818, made his will, and had it legally attested by three witnesses, by which, he devised all his real estate to his two infant children, *Caroline Duncan* and *William J. B. Duncan*, as joint tenants; and also gave them all his personal property, and to his other child he gave in these words: “*Item.* I give and bequeath to my daughter *Anne Maria Duncan*, the sum of sixty dollars, current money, as an annuity, to be paid to her out of the profits of my real estate above mentioned, annually, for and during the term of her natural life, withholding from her however, the power of selling or transferring the above mentioned annual allowance, to any person or persons whatever, under penalty of forfeiture.” On the 4th of March, 1819, without having made any alteration of this his will, he died, and the will was soon after proved in the usual form, by two of the subscribing witnesses. *Deborah Duncan*, the widow, qualified as executrix under the will, and was the guardian of the infant children, and after her death, which happened

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some time in the latter end of the year 1824, *Joseph Robinson* was appointed guardian to the two infant children, and administration *de bonis non* was granted to *Thomas Iglehart*. Upon this state of things, *Anne Maria*, with her husband *Perry Townshend*, on the 17th of August, 1826, filed their bill against *Iglehart*, *Robinson*, and the two infant children, alleging that the annuity has not been paid, and praying that the arrears might be decreed to them, and that the land might be sold for the payment thereof. The infant defendants answering by a guardian *ad litem*, admit nothing, and put the plaintiffs upon the proof of their case. The defendants, *Iglehart* and *Robinson*, having failed to answer, the usual interlocutory decree for the default was passed against them, after which *Thomas Iglehart* died, and administration *de bonis non* of the estate of the late *William Duncan*, was granted to *John Iglehart*; and this suit having been revived against him, and he having failed to answer, an interlocutory decree for the default went against him also, after which the case was submitted for a final decision; but conceiving that some further information was indispensably necessary to enable me to frame such a decree as was best suited to the nature of the case, I passed the order of the 21st of February, 1828, in answer to which the auditor made his report of the 26th May, 1829.

The defendants have excepted to the auditor's report of the 26th of May last, for several causes. 1st. Because they had not the credits to which they were entitled, which, so far as it relates to the sum of twenty dollars, since admitted to have been paid by the late *Deborah Duncan*, is well founded. The next special exception of the defendants to that report of the auditor, is, that there is no evidence whatever, in the cause, duly and regularly taken, according to the course of chancery proceedings. It was the well settled practice of the Court of Chancery of *Maryland*, under the provincial government, and has continued to be so ever since the establishment of the republic, without any doubt or interruption, that in all cases where an ac-

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count was required by the court, or the parties, a special commission might issue, directing the commissioners to take testimony, "and also to state, audit, settle and adjust all accounts relating to the matter in dispute, that should be produced to them," and to reduce into writing such account, and to return the same with the depositions of the witnesses. *Pro. Chan.* 1762, *lib. D. D. No. I.* 315. The act of 1785, *ch. 72, sec. 17*, which authorised the court to appoint an auditor, does not in any respect impair or abrogate the previous ancient practice, and therefore special commissions, calling for the return of an account along with the proofs, have often been issued since the passage of that act. *Rutland vs. Yates*, 25th August, 1789. Hence, as the court might clothe commissioners appointed to take testimony with the authority to state an account, from the proofs collected by them, so it has been held ever since the passage of the act of 1785, that when a case is referred to the auditor by an interlocutory decree to account, or by an order directing him to state an account, or make estimates, as in this instance, from the proofs in the cause, or any other proofs that may be laid before him, such a reference in itself, places him in the same situation he would have stood according to the ancient course, had a special commission been directed to him to take testimony, and also to state an account, which indeed is affirmed by the act of 1785 itself, by its authorising him to administer an oath to all witnesses, and persons proper to be examined upon such account. *Norwood vs. Norwood*, 2d Nov. 1801. *Barney vs. Hollins*, 4th January, 1810. Consequently, all the testimony collected and returned by the auditor in this case, has been taken, according to the long and well established course of the court.

With regard to the taking of testimony under the authority of a special order of the court, before a justice of the peace, I have not been able to ascertain the origin of this practice, or to trace it back to so remote a period as that of taking testimony before an accounting officer of this

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court; but I have seen it spoken of more than five and twenty years past, as a well settled practice. *The State vs. Brooke*, 27th May, 1803. And the court has gone so far as to compel a witness to submit to an examination before a justice of the peace, where it had been authorised by a special order. *Onion vs. McComas*, 1804. This mode of collecting testimony, it is believed, is peculiar to our chancery proceedings, for I have met with no mention of any such practice in the *English* books. It is, however, not only in some respects the cheapest form of gathering proofs, but in many instances it greatly facilitates and expedites the progress of the cause; and the proofs are thus taken under all the principal safeguards which can in any manner insure fairness and fulness of evidence; that is, the special order of the court, on oath, publicity, the right to cross examine, and a final responsibility. It is upon these grounds, that I think this mode of taking testimony deserves the continued sanction, approbation, and protection of this tribunal. *Winder vs. Diffenderffer*, 4th May, 1829. The testimony taken under the order of the 21st February, 1828, before a justice of the peace, has therefore been brought in, according to the regular course of the court.

The will of the late *William Duncan* it appears, has been proved and recorded, according to the act of 1715, *ch. 39, sec. 2*, which declares “that it shall and may be lawful for the judge of the probate of wills to take the probate, or cause to be proved, any last will and testament within this province, although the same concerns titles of land,” which for this purpose is still in full force. A probate so made of a will devising real estate, it has always been held, is at least *prima facie* evidence of its validity. 1 *Harr. and McHen.* 162. 4 *Harr. and Johns.* 145. 10 *Wheat.* 465. And there being in this case no evidence which so far questions the validity of the will, as to throw the burthen of sustaining its verity upon the plaintiffs, and these infant defendants, as well as the plaintiffs, claiming under it, the

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certified copy offered, must be considered sufficient for all the purposes for which it is produced.

From the pleadings and proofs in the cause, it is very clear that this will cannot be so construed, as to authorise a sale of the real estate, for the purpose of raising or securing the payment of this annuity; nor can it be construed to give the plaintiff, *Anne Maria*, an estate for life, or any other less estate, in the lands charged with the payment of the annuity. These infant devisees could only take this estate, subject to the charge upon it, and the annual rents and profits, as it is now shown, so far exceed the annuity in amount, as to demonstrate, that it is much to their benefit so to take it, and consequently all their property, in respect of this large amount of assets thus placed in their hands, is liable for the payment of this annuity. For the arrears which accrued since the death of the testator, and were left unpaid by their late guardian, *Deborah Duncan*, her sureties, if she gave any, or her legal representatives, may be held responsible to these infant defendants. But their estate is liable to these plaintiffs, to whom the sureties or legal representatives of the late *Deborah Duncan* are in no way responsible; and the present guardian of these infant defendants, *Joseph Robinson*, not having answered, and having thereby tacitly admitted that he had received a sufficiency of rents and profits from his ward's estate, must be held absolutely liable for the whole amount of the annuity which accrued, and has been left unpaid during the time of his guardianship. For the purpose of having a statement made upon these principles, the case was again sent to the auditor, who as directed, reported the statements on the 13th inst.

Whereupon it is on this 17th day of August, 1829, by *Theodrick Bland*, chancellor, and by the authority of this court, adjudged, ordered and decreed, that the bill of complaint be taken *pro confesso*, against the defendant, *Joseph Robinson*, and that the infant defendants, or the said *Robinson*, as their guardian, out of the estate and property of said wards, now in his hands, or which may hereafter come into

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his hands, pay to the said plaintiffs, or bring into this court to be paid to them, the sum of \$354 16, with interest on \$255, part thereof, &c. And it is further adjudged, &c. that the said *Robinson* pay to the said plaintiffs, or bring into this court to be paid them, the sum of, &c. together with the costs of this suit, &c. the same to be paid by the said *Robinson* out of the assets of his said wards in his hands, if any there be; if not, out of his own proper estate and effects. And as against the defendant *Iglehart*, the bill was dismissed, with costs.

From this decree the defendants, *Robinson* and the two *Duncan's*, appealed to the Court of Appeals.

The cause was argued before BUCHANAN, Ch. J., ARCHER, and DORSEY, J.

Mayer and *Pinkney*, for the appellants, contended,

1. That the devise in the will of *Duncan*, created a rent charge, and that the complainants had a complete remedy at law. 1 *Madd. Ch. Pr.* 78. 1 *Eq. Cases Abr.* 32. *Green vs. Winter*, 1 *Johns. Ch. Cas.* 80. *Phillips vs. Thompson*, *Ib.* 144. *Benson vs. Baldwin*, 1 *Atk.* 598. 2. That there is no evidence in the cause to charge the appellant. The infant defendants were not in default, and as their answers denied any knowledge of the statements of the bill, the latter should have been supported by proof, taken in the usual way under a commission. Evidence taken under a reference to the auditor is not sufficient. The act of 1785, *ch. 72, sec. 17*, defines the powers of the auditor, and the chancellor cannot enlarge them: that act merely empowers the auditor to ascertain the *extent* of a liability, and not its actual existence. 3. The relief granted by the decree is inconsistent with the relief sought by the bill. They admitted that the chancellor might decree a different relief from that which the bill asked for, provided the statements and charges of the bill would justify it, but not otherwise. But in this case, there is no allegation, that the infants or

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their guardian received the rents and profits, and therefore the decree against them in *personam* is erroneous. *Coop. Eq. Plea.* 14, (*margin.*) 4. The representative of *Deborah Duncan* should have been made a party to the bill. 2 *Brig. Dig.* 519. 1 *Ib.* 509. *Pla.* 243.

Speed, for the appellees.

The proof taken by the auditor is sufficient to warrant the decree. He contended that the cases cited on the other side, upon the point of jurisdiction, were cases of rent charge, created by deed, reserving the right of distress, as incident thereto. In the case at bar, there is a mere equitable lien, unaccompanied by any such right, and of course there is no remedy at law. The objection however, cannot be urged in this way ; it should have been insisted on by way of demurrer, or plea, or answer and plea, setting up the want of jurisdiction. *Underhill vs. Van Cortlandt*, 2 *Johns. Ch. R.* 369. He argued, that although the relief decreed, was variant from the specific prayer of the bill, yet it was warranted by the general prayer. *Graham vs. Yates and Myers*, 6 *Harr. and Johns.* 229. *Drury vs. Conner*, *Ib.* 288. Upon the question of parties, he referred to *Conner vs. Drury*, 2 *Harr. and Gill*, 221.

BUCHANAN, Ch. J., delivered the opinion of the court.

The bill alleging the annuity bequeathed to the complainant, *Anne Maria Townshend*, by her father, *William Duncan*, to be a rent charge upon the land devised by the same ancestor, to his two other children, *William Joseph Bend Duncan* and *Caroline Duncan*, both infants of tender years, seeks a sale of the land so supposed to be charged for the payment of the arrearages of the annuity stated to be due, and an investment of the surplus proceeds of sale, to meet the accruing annuity as it shall become due. *Deborah Duncan*, now dead, the widow of *William Duncan* the testator, administered on his estate, and was the guardian of the infant devisees, and on her death, *Joseph Robinson* was

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appointed guardian to the children. The bill as amended, is against the two infant devisees, and *Joseph Robinson* their guardian, and *John Iglehart*, the administrator of the administrator *d. b. n.* of the testator, *William Duncan*. *Robinson* and *Iglehart*, neither of them answered the bill, and the infant defendants in their answer, neither deny nor admit any of its contents, but say they know nothing of them, and put the complainants to proof, &c. It appears from the proof taken by the auditor, that from the time of the death of the testator, *Deborah Duncan*, who was the guardian of the children, received the rents and profits until her death, and that from the time of her death, they have been received by *Robinson*, the present guardian.

The chancellor in his decree, has taken the bill *pro confesso*, as against *Robinson*, and dismissed it as against *Iglehart*, and directed that the infant defendants, or *Robinson* their guardian, shall pay to the complainants out of the estate of his wards, or bring into chancery, to be paid to them, the amount of the annuity accruing during the life of *Deborah Duncan*, their former guardian, and stated by the auditor to remain unpaid, with interest, and that *Robinson* shall pay to the complainants, out of the property of his wards in his hands, if there be any, or if not, out of his own estate, or bring into the Court of Chancery to be paid to them, the amount of the annuity accruing since the death of *Deborah Duncan*, and stated by the auditor to remain unpaid, with interest and costs of suit. Which decree, independent of the objection urged, that it is not consistent with the relief sought by the bill, but of a different character, that being for a sale of the land on the ground that the annuity was a charge upon the land, cannot we think be sustained.

If we have taken a correct view of the subject, it was passed upon the evidence taken by the auditor, and not upon the case made by the bill. The bill contains no allegation or suggestion, of the receipt of the rents and profits by the infant defendants, or either of their guardians, or of the annual value of

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the land, or of the application of the rents and profits of any part of them, for the benefit of the infants, by either of their guardians. Nor is either of the defendants called upon to make any answer or disclosure in relation to the annual value of the land, or to the receipt, or amount, or application of the rents and profits: there is therefore no issue, to which the proof in relation to the receipt of the rents and profits, and to the annual value of the land upon which the annuity claimed is alleged to be a charge, is applicable, and consequently none to support the decree, however correct it might have been, if there was such an issue in the case. The neglect of the defendant *Robinson*, to answer, amounts to an admission only of the allegations in the bill, and nothing more; and the answer of the infant defendants, calling upon the complainants to prove the bill, only puts them to the proof of what is charged in the bill, and entitles them only to a decree on the case made in the bill, when proved. If it was necessary to prove the receipt of the rents and profits, and the amount, by the infant defendants, or their guardians respectively, or the annual value of the land, to entitle the complainants to the relief decreed, it was equally necessary to aver in the bill such receipt, or annual value, to make a case in the pleadings for such a decree.

The annuity bequeathed to *Anne Maria*, one of the complainants, is not a rent charged; it is directed to be paid out of the profits of the real estate, and there is no right or power of distress given; and there is no proof in the cause that any portion of the rents and profits was ever applied by either of the guardians, to the benefit of the infant defendants: nor does it appear that any personal property belonging to them ever came to the hands of the defendant, *Robinson*, or that they have any. *Deborah Duncan*, the former guardian, may have applied the whole of the rents and profits received by her, (except so much as was applied to the discharge of the annuity,) to her own purposes, to the prejudice of the infant defendants;

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and the defendant, *Robinson*, may have done the same, and they are by the decree, subjected to the discharge of the whole of the annuity, accruing from the death of the testator, and remaining unpaid, to be paid by them or by the defendant, *Robinson*, out of their estate, which is not directed to be sold. So far as the decree is against *Robinson*, and he is directed to pay the money out of the estate of the infant defendants, if he has in his hands no personal property belonging to them, and none should come into his hands, the decree cannot be complied with, as he is not authorised to sell the real estate. And as to that amount of the annuity which has accrued since the death of *Deborah Duncan*, and remains unpaid, we think that the defendant, *Robinson*, should not be made to pay it out of the property of the infant defendants, but his own, if he has appropriated no part of the rents and profits received by him for their benefit, but applied the whole to his own purposes, which for any thing appearing in the record, may have been done.

We do not mean to say, that the complainants would not be entitled to relief on a proper case, made against the proper parties, and supported by appropriate proof. All we do say is, that in our opinion, this is not such a case, and that the decree must be reversed, with costs in both courts.

DECREE REVERSED.

JOHN ROBERTS, *et al.* vs. SALISBURY, *et al.*—December,
1831.

An implied lien for the purchase money of land where the vendor has parted with the legal title, will not be enforced against a subsequent purchaser, without notice.

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The vendor of land who parted with the legal title, and took a mortgage of the same land from his vendee, which he neglected to record in due time, cannot enforce his mortgage against a subsequent purchaser from the vendee, without notice.

An answer flatly denying an allegation in a bill, can only be overruled by the positive testimony of two witnesses, or of one aided by pregnant circumstances—such circumstances standing alone, without the aid of positive testimony, will not destroy the effect of an answer.

Upon a bill to record a mortgage against subsequent purchasers charged with notice, the chancellor, when the case stood ready for hearing, said in his remarks preparatory to the order appealed from, "I am satisfied that the defendants must be considered as purchasers with full notice of the vendor's (the complainant's) lien, and of the mortgage which had been given to secure the payment of the purchase money, and that under the one or the other the land was bound," but passed no order directing the mortgage to be recorded. The order passed in the cause, only referred the case to the auditor, with the usual directions to receive further proof, and state an account. HELD, that nothing had been done conclusive upon either the chancellor or the parties—no question of right had been settled, and that an appeal would not lie at that stage of the cause.

APPEAL from the Court of Chancery.

On the 1st February, 1814, the appellees, *James Salisbury* and others, the heirs and representatives of one *Andrew Black*, filed their bill against *John Roberts*, *Isaac G. Roberts*, and *John Gooding*, the appellants, alleging, that the said *Andrew Black*, and one *Thomas Black*, both deceased, were in their life-time seized, and possessed as tenants in common, of a certain tract of land in *Cecil county*. That being so seized, the said *Andrew*, on the 8th October, 1808, sold and conveyed his interest in said tract, to *John Roberts*, as will appear by a copy of the deed, exhibited with the bill; and that *Roberts*, for the purpose of securing to the vendor the payment of the purchase money, duly executed and acknowledged a deed of mortgage of the same land to him, on the same day, as by reference to a copy thereof exhibited, will be seen. That soon after the execution of the mortgage, the said *Black* died, and that a contest arose, and continued for a considerable space of time, as to the right to administration on his estate, by reason

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whereof, the time limited by law for the recording of said mortgage was suffered to pass by, without its being done. That suits were instituted against the purchaser, on the bonds which he had given for the purchase money, upon which judgments were rendered at April term, 1812. That after the suits were brought, and shortly before the judgments were rendered, the said *Roberts* conveyed all his interest in the said lands, to his brother *Isaac G. Roberts*, of the city of *Baltimore*, which conveyance, the complainants charge to have been made without a valuable consideration, and to prevent the said land from being taken in satisfaction of said judgments; the said *Isaac G. Roberts*, being at the time beyond sea. That *John* and *Isaac G. Roberts* have since united in a deed of the same lands to *John Gooding*, the other appellant, and the complainants allege, and believe, that the said *Isaac G. Roberts* and *John Gooding*, at the respective periods, when the deeds were executed to them, well knew, that a mortgage had been given by said *John Roberts*, of the same land, to *Andrew Black*, and that the purchase money therefor had not been paid; and they further charge, that no valuable consideration passed from *Gooding* to the grantors. The bill then alleges, that but a small part of the purchase money had been paid to *Black*. *Prayer*. That the mortgage may be directed to be recorded, to have the same effect, as if it had been enrolled within the time required by law; and that the deeds from *John* to *Isaac G. Roberts*, and from *John* and *Isaac G. Roberts*, to *John Gooding*, be declared null and void; and for general relief.

The answer of *John Roberts*, after alleging that he had made to *Black*, sundry payments, on account of said land, asserted, that in the years 1808, 1809 and 1810, he became largely indebted to *John Gooding*, and respondent's brother *Isaac G. Roberts*, for merchandise, and responsibilities, which they had from time to time furnished, and assumed for him. That his debt to *Gooding* was upwards of \$4000, and to *Isaac G. Roberts*, exceeding \$2000, and

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that the debt to *Gooding* was guarantied by his brother ; he the respondent having promised to indemnify him for his advances and engagement to *Gooding*. That in fulfilment of this promise, on the 24th March, 1812, during his brother's absence from the *United States*, he conveyed to him the land, which respondent had purchased from *Black*, and not for the purpose of evading the payment of the judgments, which complainants were about to get. The answer denies, that *Gooding*, and *Isaac G. Roberts*, had at that time, any knowledge, so far as he is informed, of his, the respondents, having executed a mortgage of said lands to *Black*; on the contrary, he charges it as matter of belief, that they had no knowledge whatever on the subject, until sometime after the execution of his deed to *Isaac G. Roberts*, and the joint deed from *Isaac G. Roberts* and himself to *Gooding*.

The answer of *Isaac G. Roberts* stated, that upon the promise of his brother *John* to idemnify him, he consented to become his (*John's*) security, to various merchants in *Baltimore*, with whom he had dealings to a considerable amount ; and also guarantied *John Gooding* for any credit he might procure for said *John Roberts*. That in this way the said *John* became indebted to him in a sum exceeding \$2000, and placed him under a responsibility to *Gooding*, for upwards of \$4000. That whilst the defendant was on a voyage to *Europe*, in 1812, the said *John*, in compliance with frequent promises to that effect, conveyed to him the land, which he *John*, had purchased of *Black*, and he positively denies any knowledge before, or at the time of the execution of said deed, and for a considerable time afterwards, of any claim by way of mortgage, or lien of any kind outstanding, or in execution. And knowing that said conveyance was made principally for the use and benefit of *Gooding*, he proposed to him, that if he would release this defendant from his aforesaid liability, he would convey the said land to him, and upon *Gooding* consenting to do so, he and his brother *John* united in a deed bearing date

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5th June, 1812, by which the whole interest in the said land was conveyed to *Gooding*. The defendant then avers, that the first knowledge he ever had of the mortgage to *Black*, was derived from *Gooding*, a considerable time after the date of the last mentioned deed, when *Gooding* had gone to *Cecil* county, for the purpose of forbidding a sale of the land, which it was understood the representatives of *Black* were endeavoring to make.

The answer of *Gooding*, after stating the amount of his advances and liabilities for *John Roberts*, (in which it corresponds with the other answers,) and also the responsibility of *Isaac G. Roberts* over to him, proceeds to say, that it was not until some time after the execution of the deed of *John* and *Isaac G. Roberts* to him, that he had any knowledge whatsoever, that the mortgage to *Black* had been executed by *John Roberts*, or doubted, but that the said *John* had an unquestionable, legal, and equitable title to said land. The defendant denies, that at any time prior to the date of the deed to him, he had any notice from *Andrew Black*, the representatives of *Andrew Black*, or any person on their behalf, that they had any legal title, or equitable claim, or lien on said tract of land; nor did he know, that his title to the same, would be contested by those representatives, until long subsequently, when an attempt was made by them, to sell it under their judgment against *John Roberts*.

A commission issued by consent to take proof.

Nathan Baynard, a witness examined on the part of the complainants, proved, that subsequently to the 5th June, 1812, and when he was in pursuit of the sheriff, for the purpose of having the lands in the proceedings mentioned, located, in order to sell them in satisfaction of the judgments against *John Roberts*, he (the witness being the plaintiff's agent) met with *John Gooding*, with whom he had a conversation to the following effect. "The witness mentioned the subject of the *fieri facias* to said *Gooding*, who insisted he had a right to secure the money due him

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from *Roberts*. The deponent then observed, it would be a great hardship for the heirs to lose the purchase money of this land; inasmuch as he, *Gooding*, had not trusted *John Roberts* on the faith of it. Deponent also mentioned, that he had then in his possession that, which would secure the money, if he failed with the *fieri facias*. *Gooding* asked what it was, and this deponent told him it was a mortgage deed, to which *Gooding* replied, it was of no value, he did not care for it, and had the opinion of the best counsel in the state, that it was good for nothing. After some further conversation, deponent asked him if he had not a knowledge of the mortgage deed. He did not immediately give a direct answer, and deponent then inquired of him again, if he did not know of the existence of the mortgage deed. *Gooding* answered that he did." It was also proved, that *Gooding* was the uncle of *John* and *Isaac G. Roberts*, and that from the year 1808 to 1812, the mortgage from *John Roberts* to *Black*, was a good deal talked of in the county in which the land lies, and at the house of *John Roberts*, where *Isaac G. Roberts*, within the aforesaid period, was frequently seen.

BLAND, chancellor, on the 23d November, 1829.

This case standing ready for hearing, and having been by the agreement filed on the 20th inst. submitted without argument, the proceedings were read and considered.

It appears that the late *Andrew Black* and *Thomas Black*, being seised in fee, as tenants in common of a certain tract of land, *Andrew Black* sold and conveyed his undivided interest in it, to the defendant, *John Roberts*, and on the same day took from him a mortgage of it, to secure the payment of the purchase money, which mortgage deed has not been recorded according to law, nor has the whole amount of the purchase money been yet paid; after which purchase and mortgage, *John Roberts* conveyed the land to the other defendant, *Isaac G. Roberts*, and then they, *John* and *Isaac*, joined in a conveyance of it to the other defendant, *John*

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Gooding. The answers aver, that *Isaac G. Roberts* and *John Gooding*, had no knowledge of the mortgage at the time the conveyances were made to them, but they do not say, that they did not then know that the purchase money had not been paid by *John Roberts*. So far as regards their denial of any knowledge of the mortgage, these answers are contradicted by the positive testimony of the witness, *Nathan Baynard*, who declares that *John Gooding* admitted that he had known of the mortgage; and from the circumstances of *John* and *Isaac G. Roberts* being brothers, and also the nephews of *Gooding*, and the mortgage having been frequently spoken of in a public manner at the house of *John Roberts*, where *Isaac G. Roberts* often visited his brother, and from other particulars related by the witnesses, I am satisfied that *John Gooding* and *Isaac G. Roberts* must be considered as purchasers, with full notice of the vendor's lien, and of the mortgage which had accrued or been given to secure the payment of the purchase money; and that under the one or the other, the land was bound for the payment of the purchase money to the representatives of the late *Andrew Black*. But the defendant, *John Roberts*, avers, and the plaintiffs admit, that some part of the purchase money has been paid, and yet there is no proof of the time, or amount of any payment. The case must therefore be referred to the auditor, to ascertain the amount now due to the plaintiffs, for the undivided share sold by their ancestor and intestate, *Andrew Black*.

Whereupon it is ordered that this case be, and it is hereby referred to the auditor, with directions to state an account from the pleadings and proofs now in the cause, and such other proofs as may be laid before him; and the parties are hereby authorised to take testimony in relation to said account before the auditor as usual, or before any of the commissioners appointed by this court, or before a justice of the peace, &c.

From this decree the defendants appealed to the Court of Appeals.

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The cause was argued before BUCHANAN, Ch. J., ARCHER, and DORSEY, J.

R. B. Magruder for the appellants.

1. The answers of the defendants being uncontradicted, except by a single witness, and not *directly* contradicted, ought to have been held sufficient to prevent a decree against the defendants below. 2. That there were no circumstances which, taken together with the testimony of the witnesses, ought to have discredited the answers sufficiently to authorise the decree of the chancellor against the defendants.

No counsel argued for the appellees.

BUCHANAN, Ch. J., delivered the opinion of the court.

It appears that *Andrew Black*, having sold and conveyed to *John Roberts* his interest in a tract of land, took from him on the same day a mortgage of the same land to secure the payment of the purchase money, which deed of mortgage has not been recorded; that afterwards, *John Roberts*, the mortgagor, conveyed the same land to *Isaac G. Roberts*, and that subsequently, *John* and *Isaac G. Roberts* united in a conveyance of it to *John Gooding*. The object of the bill, in which it is stated that the purchase money of the land for which the mortgage was given has not been paid, and that *Isaac G. Roberts* and *John Gooding*, when the conveyances were respectively made to them, had a knowledge of that fact, and also of the existence of the mortgage, is, to have the mortgage deed recorded, and the deeds from *John Roberts* to *Isaac G. Roberts*, and *John Roberts* and *Isaac G. Roberts* to *John Gooding*, vacated. *Isaac G. Roberts* and *John Gooding* in their answers flatly deny any knowledge of the existence of the mortgage, when the conveyances to them were respectively made; and we think they equally deny a knowledge of the existence of a lien of any kind whatsoever. Nor can we perceive any thing in the evidence, to show that either of them had before, or

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at the time of the execution of the deed to *Gooding*, any knowledge that the purchase money, or any part of it, remained unpaid by *John Roberts*. An answer flatly denying an allegation in a bill, can only be overruled by the positive testimony of two witnesses, or of one, aided by pregnant circumstances, neither of which will be found to exist here, in relation to the denial by *Isaac G. Roberts* and *John Gooding*, of any knowledge of the mortgage, when the conveyances were respectively made to them. One witness, it is true, and only one, does swear that in a conversation with *Gooding*, he admitted that he had at that time a knowledge of the existence of the mortgage deed; but that was some time after the execution of the deed to him, and about the time at which he says in his answer he first acquired a knowledge of the mortgage, and does not carry back his knowledge of the mortgage, to the time of the conveyance to him. The testimony therefore of the witness, does not contradict, but is consistent with the answer; and if there were pregnant circumstances, which we do not wish to be understood as affirming, yet standing alone, without the aid of the positive testimony of a single witness, they would be unavailing. Nor is there the positive testimony of a witness, to show by the admissions of *Isaac G. Roberts*, or otherwise, that he had any knowledge of the existence of the mortgage at the time in question; we should therefore say, that in our opinion, *Isaac G. Roberts* and *John Gooding* are not to be considered and treated as purchasers with notice. But we think that the appeal has been improvidently taken; there has been no decision in chancery settling or binding the rights of the parties.

The chancellor has, it is true, in his remarks preparatory to the order appealed from, said, he is “satisfied that *John Gooding* and *Isaac G. Roberts* must be considered as purchasers, with full notice of the vendor’s lien, and of the mortgage which had accrued or been given to secure the payment of the purchase money, and that under the one or the other, the land was bound for the payment of the pur-

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chase money to the representatives of the late *Andrew Black*;" but he has passed no decree directing the deed of mortgage from *John Roberts* to *Andrew Black* to be recorded, or vacating and annulling the deeds from *John Roberts* to *Isaac G. Roberts*, and from *John Roberts* and *Isaac G. Roberts* to *John Gooding*, or either of them; but has passed an order only, referring the case to the auditor, with directions to state an account for the purpose of ascertaining the amount of the purchase money due to the complainants.

It is to be presumed, from the intimation given by the chancellor of his opinion, that it was his intention at that time, to decree relief to the complainants, at the final hearing. But he had not reached that stage of the cause to which the order in question was only preparatory, and might before the final hearing, have taken a different view of the case, and decreed accordingly. Nothing had been done conclusive, upon either the chancellor or the parties; no question of right had been settled: but upon further consideration he might, after an account taken in pursuance of the order, have rejected it and dismissed the bill, had not the proceedings been arrested by the appeal. It is not like the cases of *Thompson vs. McKim, et al.* 6 Harr. and Johns. 302, and *Williamson vs. Carnan*, 1 Gill and Johns. 184, where the rights of the parties were adjudicated upon, but cannot be distinguished in principle from *Snowden, et al. vs. Dorsey, et al.* 6 Harr. and Johns. 104, which has since been followed up by *Hagthorp, et ux. et al. vs. Hook's adm'r*, [1 Gill and Johns. 270, and *Danels vs. Taggart's adm'r*, *Ib.* 311, and *Hungerford vs. Bourne, ante*, 142. The appeal therefore is dismissed with costs.

APPEAL DISMISSED.

SOTHORON vs. GUSTAVUS and GEORGE WEEMS.—December, 1831.

Where a party at the trial of a cause makes a general prayer to the court which is refused, and the court then proceeds of their own accord to give a specific instruction to the jury, which was excepted to, this court upon appeal will review such instruction, although since the act of 1825 it would not have regarded the general prayer.

In an action of *assumpsit* brought by W. & Co. to recover a portion of the instalments mentioned in the following agreement, dated 1st Dec. 1818, viz: "We the subscribers, promise to pay unto W. & Co. the sum we may subscribe as a payment for the steam boat S. in three equal instalments, viz. &c. It is hereby understood, that we, W. & Co. bind ourselves to appropriate the money subscribed in no other manner, but for the payment and use of said boat, and that each subscriber will hold an interest in proportion to the shares he may take. We, W. & Co. bind ourselves to run said boat from B. to &c. and use every possible exertion in our power to the interest of the said boat. The shares will be divided into 280, of \$100 each." It appeared that 51 shares of the stock had been subscribed for, of which the defendants had taken *five*. **HELD**, 1. That it was not to be implied from the terms of this agreement, that W. & Co. were the owners of the steam boat. 2. That the signing of this contract was an imperfect act, of no legal obligation until the whole number of shares should be subscribed; and until that was done W. & Co. were under no obligation to perform their part of the agreement. 3. That W. & Co. having assigned, by way of mortgage, three-fifths of the said steam boat, after the signing of the agreement and before the bringing of the action, the consideration for the promise of paying the instalments contained in the agreement had failed, and therefore the action could not be sustained. 4. That upon the issue joined in this case, the defendant could not show that at a meeting called by W. & Co. of the subscribers thereto, it was determined by them not to pay the subscriptions, upon the ground that W. & Co. had failed in their part of the engagement.

Evidence offered to the jury for a particular purpose, may be properly rejected, though it might be admissible for some other object in the same cause.

Under the act of 1825, ch. 117, the appellate court considers what particular point, or question the County Court has decided, and determines accordingly, whether it is correct or erroneous, and not whether the reasons assigned by the counsel on the record justifies what has been done.

So where the admissibility of the testimony adduced, being objected to, whether it was admissible or not for the reason assigned, is wholly immaterial; this court regards as the point decided below, the competency or incompetency of the evidence.

Sothoron vs. Weems.—1831.

APPEAL from *Saint Mary's* County Court.

Assumpsit by the appellees for the use of *Gustavus Weems*, commenced against the appellant, *James F. Sothoron*, on the 20th of November, 1821. The defendant pleaded *non assumpsit*, to which issue was taken. (*See Weems, et al. vs. Millard, 2 Harr. and Gill, 143.*)

At the trial the plaintiffs read to the jury the following paper: "We the subscribers promise and oblige ourselves, our heirs and executors, to pay or cause to be paid unto *George Weems & Co.* the sum we may subscribe as a payment for the steam boat *Surprize*, in three equal instalments, in manner and form following, viz: one-third on or before the 10th day of March next, and one-third on or before the 10th day of April following, and the balance on or before the 10th day of June next. It is hereby understood, that we, *George Weems & Co.* bind ourselves to appropriate the money subscribed in no other manner but for the payment and use of said boat, and that each subscriber will hold an interest in proportion to the shares they may take, and will be entitled to draw their proportion of dividend once in every six months after the starting of the said boat. We, *George Weems & Co.* bind ourselves to run said boat from *Baltimore* to *Patuxent* river, and as far up as *Nottingham*, and to use every possible exertion in our power to the interest of the said boat. The shares will be divided into 280 shares, of \$100 each. 1st December, 1818." Then follows the list of subscribers, annexed to the above paper, to the amount in the whole of fifty-one shares. The defendant's name was down for five shares, and his signature thereto was admitted; the partnership of the plaintiffs was also admitted, and thereupon the plaintiffs closed their case.

The defendant then prayed the court to instruct the jury, that the plaintiffs were not entitled to recover; but the court [STEPHEN, Ch. J.] refused the instruction prayed for, and directed the jury that the contract or subscription list bore on its face evidence, that *Gustavus* and *George Weems*, the plaintiffs, were the proprietors and owners of the steam

boat *Surprise*, at the time when the said list or contract was signed, and that the said list proved the averment of ownership in the declaration, and that the plaintiffs were entitled to recover. The defendant excepted.

2. In addition to the evidence contained in the first bill of exceptions, the defendant offered to read in evidence to the jury, a certified copy of a deed of mortgage executed by *George Weems*, one of the plaintiffs, to *John White*, cashier of the Branch Bank of the *United States* at *Baltimore*, dated on the 18th of August, 1820, and duly acknowledged and recorded, of three undivided fifth parts of the steam boat *Surprise*, with the like proportion of her tackle, apparel, &c. to secure to the said Branch Bank the sum of \$7,600, due to it by the plaintiffs, *Gustavus* and *George Weems*, upon their joint promissory note, dated June 30th, 1820. To the admissibility of this evidence the plaintiffs objected, and the court sustained the objection. The defendant excepted.

3. After the evidence in the preceding exceptions had been given, or offered and rejected, the defendant, for the purpose of showing that *George Weems*, one of the plaintiffs, had been finally discharged under the insolvent laws of the state, offered to read in evidence a transcript of the record and proceedings in his case before the Commissioners of Insolvent Debtors, and County Court of *Baltimore* county; to the admissibility of which, under the general issue, the plaintiffs objected. The court sustained the objection, and excluded the testimony. The defendant excepted.

4. The defendant then offered to prove by a competent witness, that *George Weems*, one of the plaintiffs, advertised for a meeting of the stockholders in the steam boat *Surprise*, at *Leonard Town*, and the meeting was had some time in the summer. When they met, the said *Weems* asked for payment of their subscriptions from the present defendant, and others present; the stockholders refused to pay, alleging that he had not complied with his part of the

contract, by putting the steam boat *Surprise* in a proper state to navigate, as agreed, and the present defendant, with all the stockholders present, then agreed they would not pay their subscriptions. To the admissibility of this testimony the plaintiffs objected, upon the ground that a subsequent agreement by parol, could not be admitted to contradict or vary a written contract. The objection was sustained by the court, and the evidence withheld from the jury. The defendant excepted, and the verdict and judgment being for the plaintiffs, he brought the present appeal.

The cause was argued before BUCHANAN, Ch. J., ARCHER, and DORSEY, J.

Magruder, Scott, and Stonestreet for the appellant, contended, 1. That the contract or subscription list dated December 1st, 1818, set forth in the first bill of exceptions, was not evidence that the plaintiffs were the proprietors and owners of the *Surprise*, at the time when said list or subscription was signed, and because said paper did not sustain the averment of ownership in the declaration, nor the instruction of the court, that the plaintiffs were entitled to recover. 2. That said paper or subscription list, is only evidence of an inchoate agreement, not binding *per se*, upon either of the parties, because the small number of shares taken, as compared with the whole number necessary to the enterprise, was such as to justify the plaintiffs in declining to purchase the boat, or from putting her on the proposed route from *Baltimore* to the *Patuxent*; and that if they did so, and in all respects fulfilled the agreement on their part, in order to recover, it was incumbent on them to prove the fact. 3. That as the project had failed, the plaintiffs were not entitled to recover in the present action, without adducing evidence that the failure was occasioned by the default of the defendant. 4. The promise of the defendant, as it appears in the evidence, is a naked promise, without consideration. 5. That the court

below erred in rejecting the evidence in the second exception, because said evidence was competent to show that the said *George Weems*, one of the plaintiffs, had disposed of his interest in the vessel, and had thereby deprived himself of the power of fulfilling his part of the contract. 6. That the evidence in the fourth exception was admissible, to show a failure of consideration. They referred in the argument to 2 *Saund Pl. and Ev.* 136. 2 *Ib.* 245. *Cuff vs. Penn.* 1 *Maul and Selw.* 21. 3 *Stark. Ev.* 1007. *Batturs vs. Sellers*, 6 *Harr. and Johns.* 249. *Wyman and Gray*, 7 *Ib.* 409. *Stewart vs. The State*, 2 *Harr. and Gill*, 114.

C. Dorsey, for the appellee, referred to *Roberts on Frauds*, 124. *New. Con.* 171.

DORSEY, J., delivered the opinion of the court.

The County Court were right in refusing the defendant's prayer, in his first bill of exceptions, it being a general prayer, the granting of which, since the act of 1825, would be error. To this refusal no exception was taken. But the court, however, did not stop here; they instructed the jury, "that the contract or subscription list, bore on its face evidence that *Gustavus* and *George Weems*, the plaintiffs, were the proprietors and owners of the steam boat *Surprise*, at the time when the said list or contract was signed, and that the said list proved the averment of ownership in the declaration, and that the plaintiffs were entitled to recover; to no part of which instruction can we subscribe our assent. Instead of this subscription list *per se*, importing that at its date the plaintiffs were the owners of the steam boat *Surprise*, as far as any inference on that subject can be drawn, from its entire context we should infer, that the *Surprise* was owned by some other person, and that the object of the subscription was to raise the sum of \$28,000, with which the appellees were to purchase and equip the steam boat, for the purposes set forth in the contract. If the boat were already the property of the appellees, what motive could prompt the subscribers to require the appel-

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lees to bind themselves "to appropriate the money subscribed in no other manner but for the payment and use of said boat." The appellees being the owners, it was perfectly immaterial to the subscribers, what appropriation might be made of so much of the fund raised by subscription, as covered the price of the boat; and it were absurd in the appellees, the owners of the boat, who received the money in payment for her, to stipulate that they would appropriate the money in no other manner but for the payment of the boat; besides, if *George Weems & Co.* had been the owners of the *Surprise*, can a reason be assigned, why the price to have been paid for her was not inserted in the contract? Was it a matter to have been left to the uncontrolled discretion of the sellers, in which the subscribers, the purchasers, had no interest, and of which they desired no information? The nature of the transaction repudiates such ideas. But conceding that the County Court were correct in inferring from the subscription list, that *George Weems & Co.* were the proprietors of the steam boat, we cannot assent to that part of their instruction, which declares that they are entitled to recover. The signing of the contract was an imperfect act, of no legal obligation until the 280 shares should be taken. Until then, *George Weems & Co.* had they subscribed the agreement, as from its tenor, it was manifestly designed they should do, could not have been compelled to perform any of the stipulations on their part assumed: nor could they have exacted performance of any of the subscribers, because the implied condition (the subscription of the 280 shares,) on which their liability was to become absolute, had not occurred.

To test the accuracy of the County Court's opinion, in the second bill of exceptions, let it be admitted, that their instruction, as given in the first bill of exceptions, stands free from all objection, and that according to the proof then offered, the plaintiffs below were entitled to recover; does not the copy of the conveyance offered in evidence in the second exception, divest them of the basis of their action?

Upon the assumption of the court's correctness in the preceding exception, what is the consideration on which depends, the right to coerce the subscribers to a performance of their engagements? It is, that on payment of their money, they thereby acquire as an equivalent, an interest or property in the steam boat *Surprise*. If then it be shewn, that the payment of the subscription will not invest the subscribers, with the stipulated property in the steam boat, the consideration for their promise has failed, and payment cannot be enforced in a court of justice. The testimony offered, we think, fully establishes such failure of consideration; and the County Court therefore erred in its rejection.

The withholding from the jury the evidence set forth in the third bill of exceptions, gives to the appellant no ground for complaint; it was offered for a particular purpose, and if inadmissible therefor, it was properly rejected, although it might be admissible for other purposes. The object of the testimony was stated to be, "for the purpose of proving that he (*George Weems*) had been finally discharged under the insolvent laws of the State." This fact being immaterial to the issue in the cause, the proof for its establishment could not be otherwise, than incompetent. Had it been offered not only for the purpose stated, but to prove, that all the property, rights and credits of *George Weems*, had passed out of him, and vested in his trustee, it might perhaps have presented a different question for consideration.

The decision of the County Court in the fourth bill of exceptions, meets our approbation. The admissibility of the testimony adduced, being objected to, whether it be inadmissible or not, for the reason assigned, is wholly immaterial. If it be inadmissible on any ground, it should be rejected; and when the subject comes in review before this court, under the act of 1825, we regard, as the point decided by the court below, the competency or incompetency of the evidence, not the sufficiency or insufficiency

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of the reason urged for its rejection. Upon the issue joined on the pleadings in the cause, the testimony in this exception was clearly incompetent.

We *concur* with the County Court, in their decisions in the third and fourth bills of exceptions, but *dissent* from their opinions in the first and second, and therefore reverse the judgment.

JUDGMENT REVERSED.

STATE use of WILSON, *et ux.* vs. JAMESON.—December, 1831.

In an action by S, a distributee of W, against L, his administrator, upon the administration bond, to recover a distributive share of W's estate, it appeared, that W, on the 22d October, 1810, conveyed sundry tracts of land and negroes to F, in consideration of \$1000, paid by F; and that F, by a deed dated a few days after, and reciting the previous deed, and declaring that it was in trust, conveyed the same property to R, in trust for W for life, then in trust for the wife of W, if she should survive him, for life, or during her widowhood, then in trust for E, A, M, S, and T, daughters of W, as to one moiety of the land for life, and as to the other moiety for B, son of W, and upon the death or marriage of the daughters, then to B, in fee. The negroes were also distributed among the same parties. L, the administrator, was another son. The trust estate was not brought into *hotch-pot*. HELD, that these deeds were to be considered as one instrument, and afford ample proof, that S was advanced by the intestate in his life-time. No valuable consideration moved from S, and as respects her, the deeds were voluntary and gratuitous; but that this was no bar at law, to this action.

It is not every child that is advanced, the law excludes from distribution. It is only such as are advanced by a portion, equal or superior to a share. To make a full defence *at law*, under the act of 1798, *ch.* 101, *sub-ch.* 11, *sec.* 6, the defendant must show to the jury, the value of the plaintiff's advanced portion, and that it was equal to his distributive share.

APPEAL from Charles County Court.

The present was an action of *Debt*, instituted on the 5th August, 1825, in the name of the *State of Maryland*, at the instance, and for the use of *William M. B. Wilson*, and

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Sarah Q. his wife, against the appellee, *Luke F. Jameson*, on his bond, as administrator of *Walter Jameson*, deceased, to recover the distributive share, of the said *Sarah Q.* as one of the children and representatives of the said *Walter*, of whom there were nine.

1. At the trial it was admitted that the plaintiff, *Sarah Q.* and the defendant, are each representatives of the deceased *Walter Jameson*. The plaintiff then read in evidence, the inventory of said deceased's estate, returned by the defendant to the Orphans Court, on the 14th December, 1814, amounting to the sum of \$3524 89. Whereupon the defendant offered in evidence to the jury, a deed from *Walter Jameson*, the deceased, to one *John E. Ford*, bearing date on the 22d October, 1810, and recorded on the 31st October, of the same year; by which, for and in consideration of the sum of \$1000, to him in hand paid by the said *Ford*, the said *Jameson* conveyed to the said *Ford*, his heirs, and assigns, sundry tracts of land, and negro slaves. And also read to the jury, the following deed from the said *Ford*, to one *Raphael Jameson*, bearing date 31st October, 1810. *viz.* "Whereas *Walter Jameson*, by deed bearing date on or about the 22d day of this month, did convey and transfer unto the said *John E. Ford*, all the real and personal property hereinafter designated, as by referring thereto will more fully and at large appear; *In trust* that the said *John E. Ford* should assure and convey the said real and personal property in the manner hereinafter expressed. Now this indenture witnesseth, that the said *John E. Ford*, in compliance with the confidence placed in him, by the said *Walter Jameson*, and for the consideration of the sum of \$1000, to him in hand paid by the said *Raphael*, hath granted, bargained, and sold, and by these presents, he the said *John E. Ford* doth grant, bargain, and sell, unto the said *Raphael Jameson*, his heirs and assigns, all the following tracts, and negroes, (being the same lands and negroes contained in the before mentioned deed from *Walter Jameson* to the said *Ford*.) To have and to hold the same unto him the said

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Raphael, his heirs and assigns, *upon trust*, nevertheless, and for the following uses and benefits; that is to say, upon trust, that the said *Raphael Jameson* and his heirs, shall permit, and suffer the said *Walter Jameson*, to have the use, profits and emblements, of all the said real and personal estate, for and during the term of his natural life, without impeachment of, or for any manner of waste, and without any liability to, or for any debts contracted, or to be contracted, by the said *Walter Jameson*, after the day and year aforesaid; and from and after the death of the said *Walter Jameson*, in case *Teresa Jameson*, wife of the said *Walter Jameson*, survives him, then *in trust*, that the said *Raphael Jameson*, and his heirs, shall permit and suffer the said *Teresa Jameson* to have and receive the profits, &c. of the said real and personal estate, (except such issue, as may be born of the female slaves,) for and during the the term of her single life or widowhood, in bar of her dower, or thirds in the real and personal estate of the said *Walter Jameson*. And from and after the death or marriage of the said *Teresa Jameson*, *in trust*, as to the real estate aforesaid, that the said *Raphael Jameson* and his heirs, shall permit *Elizabeth Jameson*, *Alice Jameson*, *Mariamne Jameson*, *Teresa Jameson*, and *Sarah Jameson*, (daughter of the said *Walter Jameson*,) or such of them as shall lead a virtuous, and chaste life, severally to have, and receive one moiety of the land, heretofore described as the land on which the said *Walter Jameson* now resides; and also one moiety of the lands called *McCatees*, as aforesaid, which said moiety shall include the dwelling house of the said *Jameson*; and to permit *Benjamin Jameson*, son to the said *Walter*, to have and receive the use, &c. of the other moieties of the lands last aforesaid; and from and after the marriage or death of the said daughters, then *in trust*, that the said *Raphael Jameson*, and his heirs, shall convey by a good and sufficient deed, all the lands last aforesaid, to the said *Benjamin Jameson*, his heirs and assigns forever. And as to the

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personal estate, *in trust* that the said *Raphael Jameson*, his executors or administrators, shall deliver to the said *Benjamin Jameson* a certain negro boy, to another son, a second negro boy; and to a third son, a third negro boy. And to divide all the rest, and residue of the said negroes, with the increase, equally between the said daughters, *Elizabeth*, *Alice*, *Mariamne*, and *Sarah Jameson*." It was admitted that the plaintiffs, *Wilson* and his wife, (who is the above named *Sarah*,) did not bring into *hotch-pot*, the property received by them, in virtue of the deed from *Ford* to *Jameson*. The defendants then prayed the court to instruct the jury, that under the evidence, the plaintiffs were not entitled to recover; which instruction the court gave. The plaintiffs excepted, and the verdict and judgment being for the defendant, they appealed to this court.

When the cause came on to be argued in the Court of Appeals, it was agreed so to amend the record, "that the court should review the opinion below, upon the point, whether the deeds and evidence in the bill of exceptions, constitute an advancement in law, so as to preclude a recovery by the plaintiffs of a distributive share of the estate of *Walter Jameson*, the father, without bringing the same into *hotch-pot*."

The cause was argued before BUCHANAN, Ch. J., EARLE, ARCHER, and DORSEY, J.

Browner, for the appellants, contended,

1. That the deeds from *Walter Jameson* to *John E. Ford*, and from *Ford* to *Raphael Jameson*, express to be executed for a valuable consideration, and there is no evidence of their being intended as an advancement. 2. That if they do operate as an advancement, the jury in forming their verdict, should have taken into consideration the value of such advancement, and the amount to be deducted. Upon the *first* point, he referred to *Edwards vs. Freeman*,

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2 *P. Wms.* 436. Upon the *second*, to *Stewart vs. The State*, 2 *Harr. and Gill*, 114.

C. Dorsey and *Stonestreet*, for the appellee.

A settlement on a child in the life-time of the father is an advancement, *Edwards vs. Freeman*, 2 *P. Wms.* 445. *Powis vs. Burdett*, 9 *Ves.* 435. *Burns' Ecl. Law*, 710. The second deed shows the object of the first, and the court was the proper tribunal to expound it. *Stewart vs. The State*, 2 *Harr. and Gill*, 114. The consideration of the deed from *Jameson* to *Ford*, appears to have passed from *Ford*, and was voluntary, and gratuitous therefore, so far as concerns the children.

A. C. Magruder, in reply.

The plaintiffs having made a case, entitling them to recover, should have had a verdict, unless the deeds take that right from them. The property in the deeds is not shown to have been equal to plaintiff's proportion of the intestate's estate, which should have been done, to justify the opinion of the court, even if the deeds do constitute an advancement. Our act of 1798, *ch.* 101, *sub-ch.* 11, *sec.* 6, does not make it necessary for a party to bring his advancement into *hotch-pot*. But the deeds do not constitute an advancement. To give them that effect, it must appear *affirmatively*, that such was the object of the parent. The great question in these cases always being to ascertain the intention of the parent. 4 *Kent Com.* 413. *Jameson's* deed shows a consideration moving from *Ford* to him. It was not therefore voluntary, which is essential to an advancement. *Stewart vs. The State*, 2 *Harr. and Gill*, 114. The inference from the deed is, that an advancement was not designed, or it would have been so expressed.

EARLE, J., delivered the opinion of the court.

The court's opinion, excepted to in this appeal, manifestly relates to a state of pleadings, and issue joined between the

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parties, that do not appear in the record. The counsel in the cause admit the defect, and to save the expense and delay of a suggested diminution, have agreed, that we shall review the opinion below, as expressed in the bill of exceptions, upon the point, whether or not the deeds and evidence constitute an advancement in law, so as to preclude a recovery by the plaintiffs, of a distributive share of the estate of *Walter Jameson*, the father, without bringing the same into *hotch-pot*. It is understood too, that the generality of the prayer submitted by the defendants, is not to be noticed by us, in revising, and deciding on the opinion of the County Court. The case is an action instituted on the administration bond of *Luke F. Jameson*, administrator of *Walter Jameson*, father of the plaintiff, by *Sarah Q. Wilson*, to recover a distributive share of his personal estate, in nine parts to be divided, which from the inventory offered in evidence, appears in amount to be \$3524 89. The defendant read in evidence the deed from *Walter Jameson* to *John E. Ford*, dated the 22d October, 1810, and the deed from *John E. Ford* to *Raphael Jameson*, bearing date the 31st October, 1810; and the plaintiffs having admitted they did not bring into *hotch-pot* the property received by them under the deed from *John E. Ford* to *Raphael Jameson*, the court instructed the jury, that under the evidence, the plaintiffs were not entitled to recover.

These being all the facts laid before the court and jury, we presume their honors thought, that the daughter had been advanced, by her father in his life-time, and that she, and her husband, could not sustain their suit, without bringing the advanced property into the reckoning, with the shares of her brothers and sisters.

Upon the question of advancement, we entirely agree with the County Court. The deeds offered in evidence are conveyances in trust, by the father, for the benefit of his daughter *Sarah* and others, and afford ample proofs, that she was advanced by the intestate in his life-time. We consider them as one instrument, and conveying estates in

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trust; they are wholly unlike the bill of sale in the case of *Stewart vs. The State use of Riggen and wife*. That appeared to be an absolute transfer, for a valuable consideration of the property mentioned in it; and on a case stated, which was viewed as a special verdict, the court very properly refused to make inferences, to give a character to the deed different from what it purported to be on the face of it. But there is no need to go out of these deeds, or to have recourse to extraneous matter, to arrive at their true intention. No valuable consideration moves from the daughter *Sarah*, and so far as respects her, the conveyances are obviously voluntary and gratuitous. No account is given in the record, of the wife of *Walter Jameson*, but it would seem from the admissions of the plaintiffs, that her title to the negroes had ceased by her death or marriage. If she had at the trial been living and unmarried, we should nevertheless have been of opinion, that the plaintiff, *Sarah*, had been advanced by the settlement, or portion secured to her by the deeds. Her interest in the negroes in remainder, is a vested interest, and susceptible of valuation; and in the case of *Edwards and Freeman*, 2 *Pier. Wms.* 442, the Master of the Rolls says, that a reversion settled on a child, as it may be valued, is an advancement; and that a portion secured to a child, though in *futuro*, is a provision according to its value. In the remaining branch of the court's opinion, upon reflection, we cannot concur. To sustain the suit, there is no legal obligation on the plaintiffs, that we can perceive, to bring their advancement into *hotch-pot*. In the Orphans Court, the administrator may not have given them an opportunity to bring it into reckoning, and on a trial at law, we do not see well how they could do so. On the other hand, the defendant's evidence, that the plaintiff's wife was advanced by her father in his life-time, only goes to establish that fact, and is not of itself, sufficient to entitle him to a verdict. It is not every child that is advanced, the law excludes from the distribution. It is only such as are advanced by a portion equal, or superior, to a share. To

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make then a full and perfect defence, it appears to us to have been incumbent on the defendant, to have gone a step further, and showed by testimony the value of the portion; and to have satisfied the jury, in the words of the act of 1798, *ch. 101, sub-ch. 11, sec. 6*, that it was equal or superior, to a child's share in the intestate's estate. This would have excluded the plaintiffs from participating in the father's personal property, and nothing short of this, it seems to us, could have defeated their action. Our judgment on this subject, is formed on the case before us, and is to be understood, to apply only to a trial in an action at law. In what way we should have viewed the same point, had this been a proceeding in a Court of Equity, for a distributive share, we are at present not prepared to say. It might have required a strict examination of the *British* authorities, and a close comparison of our act of assembly, with the statute of distributions,—the statute of 22 and 23 of *Chas. 2, ch. 10*, which in this case, we have not made.

We however decidedly think, that where more than one child has been advanced, the remedy at law by a suit on the administration bond, is by no means an adequate one. The settlement on the plaintiff in the action can alone be inquired into, and if taken into the distribution, he might be seriously prejudiced, having to divide with another, the amount of whose advancement ought to exclude him from sharing in the surplus. In such cases more perfect relief might be had in a Court of Chancery, where all the parties in interest may be brought before the court, and their respective rights adjusted, agreeably to the rules of equity, among the most just of which, is equality.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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JAMES BOSLEY vs. The CHESAPEAKE INSURANCE COMPANY.—December, 1831.

Where a variety of facts have been proved, a prayer making a partial enumeration of them, and thereupon asking an instruction to a jury, will not be granted, if not sustained by a consideration of all the facts proved, which belong to the question, whether enumerated or not.

An insured is not compelled in any case to abandon. He has an election which rests in his discretion; but no right to claim for a technical or constructive total loss vests, until such election is made.

An election to abandon for a total loss cannot be made, until receipt of advice of the loss.

Intelligence of the loss of a ship derived from a newspaper, is sufficient advice to authorise an insured to abandon upon.

The information which is sufficient to authorise the assured, to give notice to the underwriter, that he abandons, must be of such facts and circumstances as would sustain the abandonment, if existing in point of fact, at the time the notice is given.

The mere stranding of a vessel, does not of itself, form a substantive ground of abandonment. The right to abandon on such an occurrence, depends on the attending circumstances.

So where the assured addressed the following note to the underwriter: "I observe by the *Boston* newspaper of the 29th January, that the ship *S*, insured in your office, was driven ashore in a heavy gale of wind, the 6th of December, and by a *Charleston* paper of the 26th of January, that on the 13th she was not got off. In so dangerous a situation as *Helvoet* roads, it is to be feared a total loss has ensued, I therefore as a measure of precaution both for your interest and my own, abandon to you, and claim a total loss." HELD, that this letter did not state to the underwriter, a sufficient reason for the offer to abandon. A mere apprehension that a total loss may have taken place, does not authorise the offer.

To justify the reversal of a court's judgment, on the ground of their having given an erroneous instruction to the jury, it must appear that the appellant actually, or probably, did sustain an injury thereby. If it did him no prejudice, no matter how erroneous, it forms no ground of reversal.

APPEAL from Baltimore County Court.

This was an action of *Covenant*, brought upon a policy of insurance effected by the appellant, *Bosley*, with the appellees, *The Chesapeake Insurance Company*. The original writ was sued out upon the 12th of July, 1823. The plaintiffs declaration contained three counts. The *first* count alleged

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that on the 12th day of December, 1822, at *Baltimore*, &c. by a certain policy of insurance, then and there made and sealed with the seal of the *Chesapeake Insurance Company* aforesaid, which the said *Bosley* here brings into court, &c. the *Chesapeake Insurance Company* did insure the said *James Bosley*, lost or not lost, at and from a port or ports in *Europe* to *Baltimore*, \$15,000, upon the body of the good ship called the *General Smith*, whereof was the master for that voyage, — *Robinson* ; beginning the adventure upon the said vessel, at and from the ports aforesaid, and so should continue and endure until the said vessel should be arrived at *Baltimore* aforesaid, and there moored twenty-four hours in safety. And it was by said policy declared and agreed, that it should and might be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at any ports or places, if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to the said insurance ; the said vessel, her tackle and appurtenances, for so much as concerned said insurance, by agreement between the assured and assurers in the said policy, was valued at the sum insured. The perils and adventures which they, the assurers, took upon themselves, and were contented to bear in the said voyage, were of the seas, men of war, fire, &c. and all other such perils, losses and misfortunes as had or should come to the hurt, detriment or damage of the said vessel, or any part thereof, for which assurances are legally accountable ; and in case of any loss or damage, it should be lawful for the assured, their factors, servants and assigns, to sue, labor and travel for, in and about the defence, safeguard and recovering of the said vessel, or any part thereof, without prejudice to the said assurance : to the charges whereof they, the assurers, should contribute, according to the amount of the sum thereby assured. And so they, the assurers, were content, and did thereby bind the *Chesapeake Insurance Company* to the assured, their executors, administrators and assigns, for the true performance of the pre-

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mises, confessing themselves paid the consideration for the assurance by the assured, at and after the rate of *two and a half per cent.*; to return *one per cent. if from one port* : in case of loss, the same was to be paid in ninety days after proof and adjustment thereof; the amount of the note for premium, if unpaid, being first deducted, provided such loss should amount to five per cent., under which no loss or damage was to be paid on ship, unless general, &c. And the said *James* in fact says, that the said ship or vessel then and there being the property of the said *James*, and so ever after continuing to be, until and up to, and at the time of the loss hereinafter mentioned, and said *James* being then and continually as aforesaid interested in said ship, to the value of all sums insured thereon, was heretofore, to wit, on the 3d day of December, 1822, at a port in *Europe*, to wit, at the port of *Rotterdam*, to wit, at, &c. and then and there being the property as aforesaid of the said *James Bosley*, and being so the property of the said *Bosley* at the time of making said insurance, and said policy of insurance did, to wit, on the said 3d day of December, 1822, depart and set sail from a port in *Europe* as aforesaid, to wit, from the port of *Rotterdam*, on her said voyage in said policy mentioned, for and towards *Baltimore* aforesaid; and that afterwards, and whilst the said vessel was proceeding on said voyage, to wit, on the 4th day of February, 1823, to wit, in *Helvoet* roads, to wit, at, &c. and before the completion of the voyage aforesaid, the said vessel was by the force and violence of the winds and waves, and by the perils and dangers of the seas, forced, driven and cast upon and against certain shoals and banks, and thereby, and by drift of ice, then and there, became strained, disjointed, broke and damaged, insomuch that the said vessel thereby then and there was wholly lost to the said *James*, and a large sum of money, to wit, the sum of \$2,000, was then and there expended by the said *James*, in and about the safeguard, recovery, defence and preservation, and toward the reparation of said vessel; which said sums of money

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so paid, laid out and expended, and the said sum of \$15,000, the defendants became and were liable to pay the said *James* according to the tenor and effect of the said policy of insurance; of all which premises the said *Chesapeake Insurance Company*, to wit, on the 4th day of February, 1823, had notice, to wit, at, &c.

2d Count. After referring to the same policy, it averred, —And the said *James* does in fact say, that the said ship or vessel was, to wit, on the 3d day of December, 1822, in good safety at a port in *Europe*, to wit, at the port of *Rotterdam*, and that afterwards, to wit, on the said 3d day of December, in the year last aforesaid, the said ship departed and set sail from the port in *Europe* aforesaid, to wit, from the port of *Rotterdam* aforesaid, for and toward *Baltimore* aforesaid, on her voyage in said declaration mentioned; and that whilst the said ship was proceeding on her said voyage, and before the completion thereof, and her arrival at her port of destination aforesaid, to wit, on the 4th of February, 1823, to wit, in *Helvoet* roads, &c. by the perils and dangers of the seas, was stranded, and wholly lost to the said *James*, and that large sums of money, to wit, to the amount of \$2,000, were then and there expended by said *James*, in and about the safeguard, defence, recovery, and preservation and reparation of said ship, which said sum of money, and the said sum of \$15,000, the defendants became and were liable to pay to the said *James*, according to the tenor and effect of said policy of insurance; and the said *James* in fact says, that at the time of making the said policy of insurance, and continually thence up to and at the time of the loss aforesaid of said ship, the said ship was his property, and that he was interested therein as valued, to the value of all the sums insured thereon as aforesaid, of all which premises the *Chesapeake Insurance Company*, to wit, on, &c. at, &c. had notice.

3d Count. Alleged as a breach of the covenants in the same policy—that before the completion of her said voyage, to wit, on the 4th of February, 1823, to wit, at *Helvoet* roads, to wit,

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&c. at, &c. before the arrival at her port of destination, *Baltimore* aforesaid, by the perils and dangers of the seas, and by stormy and tempestuous weather, and the violence of the winds and waves, was bulged, broken, and damaged, and destroyed, insomuch that the said vessel then and there became wholly lost to the said *James*, and a large sum of money, to wit, the sum of \$2,000, was then and there expended by the said *James*, in and about the safeguard, defence and recovery, and preservation and reparation of the said vessel; which said sum of money, and the said sum of \$15,000, the defendants, according to the tenor and effect of the said policy, became and were liable to pay said *James*; of all which premises the *Chesapeake Insurance Company* aforesaid had notice, to wit, &c.; yet the said the *Chesapeake Insurance Company*, although, &c.

To this declaration, the defendants below pleaded that they had not broken their covenant, upon which issue was joined.

1. At the trial of this cause, a variety of depositions, documents, and letters, were read, which the reporters do not deem it necessary, for the understanding of the points ultimately decided by either court, to introduce, but have prepared the following general statement of the evidence offered to the jury.

The plaintiff, to support the issue on his part, proved his property in the ship, the policy of insurance declared upon, and that he had tendered a deed of cession to the defendants, for his interest in the ship *General Smith*, which they refused to accept. He then read to the jury the following copy of a letter sent to the defendants:

“*Baltimore*, 4th February, 1823.—*Gentlemen*—I observe by the *Boston* newspaper of the 29th January, that the ship *General Smith*, insured in your office pr. policy No. 7661, was driven ashore in a heavy gale of wind the 6th of December, and by a *Charleston* paper of the 26th of January, that on the 13th she was not got off. In so dangerous a situation as *Helvoet* roads, it is to be feared that a total loss

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has ensued. I therefore, as a measure of precaution for both your interest and my own, do hereby abandon to you, and claim a total loss. Respectfully, gentlemen, your obedient ser'vt. (Signed,) *James Bosley.*

To the President and Directors of the *Chesapeake Insurance Company.*”

The plaintiff then further offered proof, that the ship *General Smith*, upon the voyage mentioned in the policy of insurance declared upon, set sail in ballast from *Rotterdam* for *Baltimore*, on the 3d of December, 1822, and anchored about four miles below *Rotterdam*, on the same day; that on the 5th of December, being at anchor at *Helvoet* roads, with a pilot on board, a violent squall from the S. and W. struck the ship and drove her aground; that on the 6th, a violent gale coming on, notwithstanding the exertions of the master and crew, the ship was driven 100 fathoms upon a mud bank by the force of the wind; that on the 7th the gale moderated; that every exertion was made to get the ship off, without avail; that she fell on her beam ends; at low water the bank was dry, and the people from the ship could walk around her, when she was from 200 to 300 yards from the edge of the water; that ice began to form about the middle of December, and made around the ship in large banks. The ship's ballast was, while she was aground, thrown overboard; assistance was procured from the shore, but with every exertion, the ship was not got off. She remained aground until from the 1st to the 4th of February, when she was at times afloat in her bed on the mud bank. On the 5th the ship floated, but as the ice had then broken, and there was much danger from getting among it, every exertion was made to keep her on the bank, and prevent her getting into the channel way. On the 13th of February, the ship was finally got off, and proceeded to *Williamstadt*, and afterwards to *Dort*, where she was hove out, both sides caulked at a heavy expense, and on the 13th of March again set sail for *Baltimore*, where she arrived on the 6th April, in a leaky condition.

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There was evidence that while the ship was aground, she was materially injured, strained and hogged; that the place on which she grounded, was very much exposed, the weather cold and severe, the crew greatly exposed and frost-bitten; that the master was a man of skill and intelligence in his profession, faithful and attentive to his duties. After the ship's arrival at *Baltimore*, she was libelled by the seamen for wages, condemned, and sold under a decree of the District Court of the *United States*. The ship after being sold under the decree, was repaired in *Baltimore*, at considerable expense, and went to sea again.

The defendants offered evidence that the place where the ship was aground, was a soft mud bank, and that she could have been got off the bank at any time with proper exertion, and with little or no damage, and at no great expense; that she was not hogged by being ashore, and that she is still a good ship. Thereupon the plaintiff by his counsel, prayed the court to instruct the jury as follows;

First. If the jury find from the evidence that *Captain Robinson*, the commander of the ship in question on the voyage insured, was a man of integrity, and competent skill in his profession, and that after the ship was driven on shore in the manner stated in the testimony, he acted according to the best of his judgment for the interest of all concerned; and if the jury also find, that on the *4th of February, 1823*, the time of the plaintiff's abandonment, the ship still continued on shore, and also continued on shore until the *13th* of that month, and was at the time of said abandonment, and for some time before and after, in imminent danger of being wrecked and lost, that then the plaintiff is entitled to recover for a total loss, notwithstanding the ship was afterwards saved, and notwithstanding the jury may find that said *Robinson* might have erred in not choosing other means within his power, better fitted to the saving of his said vessel; provided they be of opinion, from all the evidence, that said error was such as a man of ordinary skill and judgment, and experience in

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the commanding of ships, might, under like circumstances, have committed.

Second. If the jury, find from the evidence, that the ship *General Smith*, on or about the 4th day of December, 1822, sailed from *Rotterdam* for *Baltimore*, on the voyage mentioned in the policy of insurance on which this suit is brought, and while on the said voyage was, on or about the 5th of December, 1822, driven on shore near *Helvoet*, in the manner stated in the testimony; and if the jury also find, that the ship continued on shore until February 13th, 1823, and that during all that time while she was thus on shore, *captain Robinson*, the master of said vessel, acting according to the best of his skill and judgment, for the interest of all concerned, endeavored to get the vessel afloat to pursue her voyage, whenever he supposed it to be practicable, and safe to do so; and in, and as, to said endeavoring, acted as a man of ordinary skill and judgment, and experience in the commanding of ships, would, in like circumstances have acted; and if the jury also find, that the said *Captain Robinson* was a man of integrity, and of competent skill in his trade and business as master and commander of such a ship as the *General Smith*, for the voyage insured, and that notwithstanding the exertions so made, the said vessel, at the time the abandonment was made, continued aground and on shore, and incapable, therefore, of pursuing her voyage; and if the jury also find, that at the time of said abandonment, it was, and continued to be, uncertain and doubtful, whether she could ever be got off in safety, then the said abandonment is valid, and the plaintiff entitled to recover for a total loss.

Third. If the jury find from the evidence, that the ship *General Smith*, on or about the 4th of December, 1822, sailed from *Rotterdam* for *Baltimore*, on the voyage mentioned in the policy of insurance, on which this suit is brought, and while on the said voyage, was, on or about the 5th of December, 1822, driven on shore near *Helvoet*, in the manner stated in the testimony; and if the jury shall

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also find, that the said ship continued on shore until the 13th of February, 1823, and that during all that time, while she was thus on shore, *Captain Robinson*, acting according to the best of his skill and judgment, and as a man of ordinary skill and judgment, and experienced in the commanding of ships, would, in like circumstances, have acted, endeavored, whenever it appeared to have been practicable and safe to do so, to get the ship afloat, to pursue her voyage; and if the jury also find, that the said *Captain Robinson* was a man of integrity, and of competent skill in his profession, as commander of such a ship as the *General Smith*, for the voyage insured, then, that the ship was by being so cast on shore, arrested, and restrained in her voyage by perils insured against, and on the 4th of February, 1823, had been detained for an unreasonable length of time from the free use and possession of the plaintiff, and therefore the said abandonment is valid, and the plaintiff is entitled to recover for a total loss.

Fourth. If the jury find from the evidence, that the ship in question was driven on shore on or about the 4th of December, 1822, near *Helvoet*, when pursuing the voyage described in the policy of insurance on which this suit is brought, and continued on shore from that time until February 13th, 1823, and was thereby strained, broken and injured, to the extent and amount of more than half her value, that then the abandonment is valid, and the plaintiff is entitled to recover for a total loss, provided the jury shall also find, that during all the time the said ship was thus on shore, *Captain Robinson*, the master of said vessel, acted according to the best of his skill and judgment for the interest of all concerned, in and as to endeavoring to get the vessel afloat to pursue her said voyage, and as a man of ordinary skill and judgment, and experience in the commanding of ships, would, in like circumstances, have acted; and provided also, that they find that the said *Captain Robinson* was a man of integrity, and of competent skill in his trade

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and business as a master and commander of such a vessel as the *General Smith*, for the voyage insured.

And thereupon the defendants, by their counsel, prayed the court to give the following instructions to the jury.

1st. That if the jury shall find from the evidence in the cause, that after the ship was blown ashore in *Helvoet* roads, she might have been got off at any time anterior to the 13th of February, 1823, at an expense of less than half her value, and been enabled thereby to prosecute her voyage without further delay, and that the means of getting her off were not employed by the master of the ship, owing to his unwillingness to make the expenditure, from an apprehension that it would not be approved and sanctioned by the plaintiff, his employer, and that the ship was thereby delayed in the prosecution of her voyage, from the 6th of December, 1822, to March, 1823; that this delay having been unnecessary, was a deviation, which discharged the underwriters from all damage sustained by the ship subsequent to the time, at which she might have been got off.

2d. That if the jury shall find from the evidence in the cause, that the intelligence placed before the defendants by the plaintiff's offer to abandon, of the 4th of February, 1823, did not present the case of an entire destruction of the ship, nor a case in which she had been damaged to more than half her value, nor a case in which a total loss from stranding was in the highest degree probable, the case was not one in which the plaintiff was authorised to abandon, and claim for a total loss, and the plaintiff is entitled to recover only for a partial loss.

3d. That if the jury shall find from the evidence in the cause, that the intelligence placed before the defendants by the plaintiffs offer of abandonment, of the 4th of February, 1823, presented a case in which it was probable that the ship might have been got off from the shore in a reasonable time, at an expense of less than half her value, the case was not a proper case for abandonment, and the plaintiff can only recover for a partial loss.

4th. That if the jury shall find from the evidence in the cause, that the ship when blown ashore in *Helvoet* roads, and detained there from the 6th to the 13th of December, in the manner described in the plaintiff's offer of abandonment of the 4th of February, 1823, was not in imminent danger from stranding, but was in imminent danger of being detained on the shore till ice would be formed, which might cut her to pieces, that such apprehended danger from ice not having been assumed as the ground of the offer to abandon, cannot be relied on by the plaintiff to support the abandonment; and even if it had been assumed as the ground of the offer to abandon, that the mere apprehension that ice would form, which might cut the ship to pieces, however reasonable such apprehension may have appeared, would have given no right to abandon: and that the plaintiff, had such been the ground of the offer to abandon, could only have recovered for a partial loss.

5th. That if the jury shall find from the evidence in the cause, that on the 4th of February, 1823, when the offer to abandon was made, the danger of a total loss from stranding was not in the highest degree probable, and that at that time, the only danger that existed, was the danger of the ship's being borne by the water from the shore out into the current among the floating ice, and of being destroyed by the ice; the case was not on the 4th of February, 1823, a proper case for abandonment on the ground assumed by the plaintiff in his offer of abandonment of that date; nor would the case have been a proper one for abandonment had the plaintiff there known and assumed the said apprehended danger from the ice, as the ground of his offer to abandon; and that on the state of facts assumed in this prayer, he is entitled to recover only for a partial loss; but the court rejected each and every of the said prayers of both plaintiff and defendants, and were of opinion, and directed the jury as follows: That the plaintiff's intelligence of the state of his vessel, authorised the abandonment as offered in evidence, provided the existing state of facts on

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the 4th of February, authorised an abandonment for a total loss; that the danger from being cut to pieces from the ice, was one of the perils to which the stranding of the vessel exposed her, and if on the 4th of February she was damaged to the amount of more than one-half her value, or was in imminent peril, and the highest degree of probability of actual or technical total loss existing, then the plaintiff is entitled to recover for a total loss, unless the captain had reason to believe that she could be got off in safety, for one-half her value, before the 4th of February, and from any cause whatever neglected to attempt it; that is to say, he was bound to go up to the amount of half her value, unless he had reason to believe that the means actually used by him were sufficient for that purpose. To which rejection of said prayers, as made by the plaintiff, and to the said opinion and direction of the court, the plaintiff excepted.

The cause having been submitted to the jury, under the foregoing instructions, they found a verdict of \$5,786 36, for the plaintiff. Whereupon the plaintiff appealed to this court.

The cause was argued before BUCHANAN, Ch. J., EARLE, and DORSEY, J.

Mayer, Johnson, and Taney, (Att'y Gen'l U. S.) for the appellants, cited, *Rhinelanders vs. Ins. Co. Penn*, 4 Cranch. 41. *Marshall vs. Delaware Ins. Co.* 4 Cranch, 206, 208, 2 Marshall, 578. *Lawrence vs. Ocean Ins. Co.* 11 Johns. 293, 295. *Wood vs. Lincoln and Kennebeck Ins. Co.* 6 Mass. Rep. 482. *Phil. on Ins.* 459. *Peele vs. The Merchants' Ins. Co.* 3 Mason, 27, 29, 41, 48, 53, 57, 58, 65. 2 Mar. 586. *Columbian Ins. Co. vs. Catlett*, 12 Wheat. 391. *Idle vs. The Royal Exchange Co.* 4 Serg. and Low, 279. *Green vs. The Royal Exchange Co.* 6 Taunt. 71. *Bishop vs. Pentland*, 14 Serg. and Low, 33. *Phil. on Ins.* 442, 448. 2 Mar. 598, 9, 601. *Ralston vs. Union Ins. Co.* 4 Binney, 386, 403. *Dorr vs. New Eng. Mar. Ins. Co.* 4 Mass. 230. 3 Kent, 268. *McIver vs. Henderson*, 4 Maul. and Sel.

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576. *Goss vs. Withers*, 2 Burr. 683. *Miller vs. Fletcher*, Doug. 231. *Park. ch. 9*, 219. *Phill. on Ins.* 442. *Ib.* 391. *Anderson vs. Wallis*, 2 Maul. and Sel. 248.

Glenn, and Wirt, for the appellee, cited, 2 Mar. 590, 565, 601. *Dederer vs. Delaware Ins. Co.* 2 Wash. C. C. R. 61. *Phil. on Ins.* 448. *Peel vs. The Merchants' Ins. Co.* 3 Mason, 27. 3 Kent. 265, 249. *Hughes on Ins.* 416. *Bell on Ins.* 610. 2 Mar. 586. *Columbian Ins. Co. vs. Catlett*, 12 Wheat. 391. *Anderson vs. Wallis*, 2 Maul. and Selw. 240. *Everth vs. Smith*, *Ib.* 278. *Falkner vs. Ritchie*, *Ib.* 290. *Brotherston vs. Barber*, 5 *Ib.* 418. *Cologan vs. London Assurance Co.* *Ib.* 446, 447. *Patrick vs. Com. Ins. Co.* 11 Johns. 13. *Suydam and Wyckoff vs. Marine Ins. Co.* 1 Johns. 181, 183. *King. vs. Delaware Ins. Co.* 2 Wash. C. C. R. 309. *Phil. on Ins.* 448. *Wood vs. Lincoln and Kennebec Ins. Co.* 6 Mass. 483. 11 Petersd. 466.

DORSEY, J., delivered the opinion of the court.

The first and third bills of exceptions, on the part of the appellant having been waived or abandoned, our duty is to inquire whether there be such error in the County Court's instruction to the jury, or their refusal of the appellant's prayers in his second bill of exceptions, as would require a reversal of their judgment? The propriety of the court's denial of the several instructions which they were called on to give, will be first examined.

The first prayer presents an hypothetical statement of facts, not enumerating all which had been proved, but predicated upon, and assuming the existence of those material facts, of which competent and adequate testimony had been offered, and the finding whereof, was indispensable to a recovery. These facts set forth in the bill of exceptions, were as fully in the view of the court, in making a disposition of the points presented, were as necessarily subjects of consideration, as if they had been incorporated in the statement itself. The instruction requested could not for

a moment have been sustained; nay, could not have been asked for, but upon this assumption.

The abandonment, one of those important links in the chain of testimony, is expressly referred to, and was to be regarded in the same manner, as if the proof, by which it was established, had been set out in the statement. If no sufficient abandonment had been made, the instruction prayed for could not have been granted. The finding of the facts enumerated, could of themselves form no basis of a recovery, as for a total loss. Before the court could have instructed the jury, that the plaintiff was entitled to such a verdict, they must of necessity have determined, that it was warranted by the abandonment. The sufficiency of the abandonment, the correspondence of its grounds with those relied on as evidence of loss, were clearly submitted for, and settled by the determination of the court below; and notwithstanding the act of 1825, in reviewing their judgment, form fit subjects for discussion before this tribunal.

The insured is not compelled in any case to abandon, he has an election, which rests in his discretion; but no right to claim as for a total loss in its nature technical or constructive, can vest, until such an election be made. He can only abandon for a total loss; and his election to do so, can never be made until the receipt of the advice of the loss. It has been urged by the appellees, that the intelligence of loss communicated in this case, was of such an unauthentic nature, that the assured was not authorised to rely on its verity, and deal with the underwriters accordingly. But we cannot yield our assent to this suggestion. The information received would have carried conviction to any reasonable mind; was positive, untainted by any suspicions as to its truth; and if the facts which it made known, justified his abandoning, the insured was not bound to wait for more authentic advice.

Were the underwriters liable for a total loss, under the abandonment in the case at bar, is the first question to be

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disposed of. Before the expression of our opinion, let us refer to some of the authorities pertinent to this subject. In 1 *Johns*. 181. *Suydam, et al. vs. Marine Ins. Co.* the court say, abandonment must be “on sufficient grounds, and the accident occasioning it, must be described with certainty, so as to enable the underwriter to determine, whether he be bound to accept. If he be not, he will of course refuse, and neglect to take measures for its preservation, which is one object of making an abandonment.” A similar principle is found in the court’s opinion, in *King vs. Del. Ins. Co.* 2 *Wash. C. C. Rep.* 309. It is incumbent on the insured to state to the underwriter a sufficient reason for the offer to abandon. “This is clear from the nature and use of an abandonment. The underwriter should have an opportunity of judging whether he is bound to accept the offer or not. If bound, that he may do so at once, and take proper means for the preservation of the property.” As the assured must at the time of abandoning, state the grounds upon which he makes the abandonment, it is necessary, in order to make the act valid, not only that the existing facts should constitute a total loss; but also that the assured should be informed of the accident, which occasions the loss. He cannot abandon merely upon the apprehension, that a total loss may have taken place, and afterwards establish his right to do so, by facts that subsequently come to his knowledge, and which were wholly unknown to him at the time of making the abandonment. *Phil. Ins.* 440. “The underwriters ought to know the grounds of the abandonment, that they may determine whether to accept. Accordingly, the assured must at the time of making the abandonment, make known to the insurers, the reasons for which he abandons. He cannot avail himself of any other ground, than that alleged by him at the time of abandoning; and if there be any other facts, (either known, or not known to him at the time,) on which an abandonment would be necessary, in order to entitle him to recover for a total loss, he must abandon anew, before he can recover for such a

loss, on account of those facts.” *Phil. Ins.* 448. “The facts of which the insured is informed, and which he makes known to the underwriters, as the ground of his abandonment, must constitute a total loss.” *Phil. Ins.* 458.

From the authorities referred to, as well as upon principles of reason, justice and policy, we deem this rule undeniable, that the information which is sufficient to authorise the assured to give notice to the underwriters, that he abandons, must be of such facts and circumstances, as would sustain the abandonment, if existing in point of fact, at the time the notice is given. The mere stranding of a vessel, forms not of itself, a substantive ground of abandonment. The right to abandon on such an occurrence, depends on the attending circumstances. If she be thrown so high upon the beach that her removal is impracticable, or if on a shore where the means of relief are unattainable, or where the exertion of those means would incur an expenditure exceeding half her value, then is the assured at liberty to abandon. To sustain this doctrine so constantly met with in the decisions of courts of justice, and in writers upon the law of insurance, it cannot be necessary to refer to authorities.

What was the intelligence communicated in this case? Simply this, “I observe by the *Boston* newspaper of the 29th January, that the ship *Genl. Smith*, insured in your office, per policy No. 7661, was driven ashore in a heavy gale of wind, the 6th December, and by a *Charleston* paper of the 26th January, that on the 13th she was not got off. In so dangerous a situation as *Helvoet Roads*, it is to be feared that a total loss has ensued.” It has not been contended, that the fears of the insured are equivalent to a total loss, and constitute a ground of abandonment. There is no such head in insurance law, as abandonment *quia timet*. Do the facts disclosed in the notice show a total loss, either actual or technical? for unless they do, the abandonment is wholly defective. If mere stranding be not a total loss, there is no total loss disclosed by the notice. The only facts upon

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which such a conclusion could rest, are, that in a gale of wind, the ship was driven on shore, and had remained there seven days. But whether she remained there from choice, to make some inconsiderable repair, as for example, to re-ship her rudder, or from necessity; whether she was thrown one foot, or one mile, from the channel of the river; whether she laid high and dry, or in ten feet water; whether she had sustained any damage by the accident; whether any effort had been made to get her afloat; or whether the accomplishment of that object was impracticable, or could be accomplished by the expenditure of ten dollars, or ten thousand dollars, were matters on which the insurer were left to speculate in utter darkness. Can it seriously be urged that the underwriters, by the tenor and spirit of their contract, under such circumstances, were bound to have accepted the abandonment, and thus become the purchasers of the ship, at the valuation in the policy? If there be any case to sustain such pretensions of the appellants, it has not been cited in the argument, and certainly has eluded the researches of the court.

It has been contended, “that an abandonment does not depend on the information given at the time it is made, but on the facts, or state of the property, at the date of the abandonment.” This position cannot be sustained; it has neither principle nor authority to support it. If it were true, it would follow that an abandonment would be effectual where a loss had occurred, although a knowledge of such loss, had never reached either the insurer or insured—that the insured need not make known the intelligence he has received of the disaster—that information of the slightest impending peril would support an abandonment, if at the time it was made, the condition of the thing insured constituted a total loss;—that such doctrine is at war with every adjudicated case on the subject, it can hardly be necessary to remark. Suppose both the insurer and insured to have resided at *Rotterdam*, or in the immediate vicinity of the place

of stranding, and that on the 13th of December, (the time when the facts relied on, as showing a total loss,) the abandonment had been made; and made too, not only on the grounds stated in the notice, but upon all the circumstances connected with the disaster, could it be insisted that a total loss then existed, in point of fact, or was "in the highest degree probable," or that the moral certainty of its occurrence was such, that upon principles of reason or law, it might be assumed as having already taken place? The ship lay on the bank, free from injury, save an unimportant one to her rudder, which had been repaired. Nothing was required to place her in a state of safety in the stream, but a shifting of the wind to the northward or westward. Could the loosest *dictum* that ever escaped a judicial tribunal, make such a state of things a total loss? If the right of abandonment existed not where the contracting parties resided, at the theatre of the disaster, it derives no additional strength from the fact of their residence being several thousand miles distant. The claim to abandon, depends altogether upon the nature of the intelligence received, which must be communicated to the assurer; but here it is attempted to sustain this abandonment, not upon the facts received by the assured, and made known to the underwriters, nay, not even upon the actual condition of the property insured, at the date to which the intelligence relates, but upon accidental contingencies, transpiring a month or two months afterwards, and never previously submitted to the insurer, as the basis of the claim. The sufficiency of an abandonment rests not merely on the occurrence of facts, which constitute a total loss, but upon their knowledge by the assured, the communication thereof to the assurer, with an offer to abandon, and the continuance of the disaster at the date of the abandonment.

Were we to extend the right of abandonment to the extent to which it has been insisted on in the present trial, it would be carried much beyond any limits heretofore prescribed to it. According to our view of the subject, this

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right has been already expanded as far as expediency or justice will tolerate. A policy of insurance is a contract of indemnity, not of sale. If, on light grounds, or mere probabilities of loss, a right of abandonment arises, you convert underwriters into traders, and impose on them, if they regard the interests they represent, the duty of inquiring into the nature and value of the cargo insured, the grounds upon which rests the calculation of profit from the commercial adventure, and all the probable consequences of a coercive sale, at a port intermediate the *termini* of the voyage; thus compelling the insured to make public that commercial intelligence, upon which his adventure is predicated, and upon the concealment of which depends the success of his enterprise. There is much good sense in the remark by *C. J. Willes*, in *Willes' Rep.* 640, "that insurances were contracts of indemnity, and not for profit or gain;" and there is equal wisdom in what is found in a learned commentary on insurance law, *Hughes' Ins.* 415.—"It is clear that a policy of insurance, both in its object and form, is merely a contract of indemnity. It contains no stipulation respecting abandonment, has its origin from the nature of the contract, as a contract of indemnity. The underwriter does not stipulate, under any circumstances, to become the purchaser of the thing insured; it is not supposed to be in his contemplation; he is to indemnify only. This being the principle, a practice or doctrine which is calculated to break in upon it, ought to be narrowly watched."

The cases of *Peele et al. vs. The Merchants' Ins. Co.* 3 *Mason*, 27, and *Fontaine vs. The Phoenix Ins. Co. New-York*, 11 *Johns.* 293, have been much relied on by the appellants. But is there the slightest similitude between the nature of the facts shewing the loss in those cases, and those which belong to the case before us? In the case in 3 *Mason*, the *Argonaut* was cast upon the rocks, bilged, the tide flowed freely through her, her sails and rigging cut from the masts, all her furniture removed for safety, the master and crew had deserted her expecting her to go to

pieces, if the wind had veered to the north-west, her destruction inevitable, and her situation was so desperate, that there remained of her recovery, but a glimmering ray of hope; under these circumstances, Justice *Story* held the loss to be total, in accordance with the opinion of *Lord Ellenborough*, who in *Anderson vs. Wallis*, 2 M. and S. 240, says, "there is not any case, nor principle, which authorises a total loss, unless where the loss has been actually a total loss, or in the highest degree probable, at the time of abandonment." In the case in 11 *Johns.* the vessel was driven against the rocks at *St. Pierre, Martinique*, and beating against them some time, was driven so high on shore, that when the gale subsided and the sea became calm, there was only two or three feet water on the out side of her. The master, mate, and supercargo, made depositions that it would cost more than her value to get her off; that a survey was had of the vessel, and she was condemned, and sold: the purchaser afterwards got her off at an expense of \$500. The court held, that her situation being desperate at the time of the survey, the subsequent good fortune of the purchasers did not destroy the plaintiff's right to recover for a total loss, unless the jury believed she could have been got off for half her value. It is unnecessary to draw the strong lines of discrimination existing between the cases cited, and that now under consideration. They are authorities against the appellant's right to recover.

This first prayer appears to have been framed, and it was so argued before us, as if intended to call on the court to decide, that "imminent danger of being wrecked and lost," justified abandonment, and recovery for a total loss. In this aspect of the prayer, we entirely concur with the County Court in its rejection: mere "imminent danger" of a total loss, never has been deemed sufficient ground to entitle the assured to a verdict for a total loss. The courts have only gone thus far in the cases, where danger was not only imminent, but the loss in the highest degree probable.

We wish to be understood as not expressing any decided opinion in this case, whether if all the circumstances connected with the stranding of the *General Smith*, from the 5th of December, 1822, to the 6th of February, 1823, or to any previous day, had been inserted in a notice of abandonment, delivered to the underwriters, that the plaintiff would not be entitled to recover for a total loss, but as at present advised, we should deliberate much, and long, before our minds could be brought to the adoption of such a conclusion.

The second prayer has been discussed, as if presenting the question, whether the loss were not total, “as by the stranding of the ship, she, for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage, is uncertain.” As conclusive of the affirmative of this question, and to show that the right to abandon is immediate and complete, the appellant relies on the rule laid down by Justice *Story*, in the case of *Peel et al. vs. The Merchants’ Ins. Co.* 3 *Mason*, 65, where a learned and elaborate review is taken of most of the *English* and *American* cases on the subject, in the conclusion of which, that enlightened jurist says, “the right to abandon exists, whenever, from the circumstances of the case, the ship, for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owners, and the time when she will be restored to him in a state to resume the voyage, is uncertain, or unreasonably distant, or the risk and expense are disproportioned to the expected benefit, and objects of the voyage.” This literal construction, and technical application of the rule, is wanting in candor and justice to the learned judge. His rule was extracted from the adjudicated and admitted principles and cases that he refers to, which immediately precede it, and on which he relies as its basis. It ought not, therefore, in fairness, to be applied to cases in no wise analogous in their circumstances: but admitting the correctness of its application to the perils enumerated, embargoes, blockades,

detentions, submersions, and shipwrecks, which cannot be repaired in the ports where the disasters happen, it surely is not a fair, or rational interpretation of the judge's opinion, to embrace within it the case of mere stranding, when in a preceding part of the same opinion, he states it to be a position "incontrovertible, that the mere stranding of the ship is not, of itself, to be deemed a total loss, so as to entitle the insured immediately to abandon." If, however, the true exposition of this rule, be such as is given it by the counsel of the insured, we must be excused in withholding from it our approbation. They allege that the *General Smith* being aground, "for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she will be restored to him, in a state to resume the voyage, is uncertain," and therefore the insured may rightfully abandon. By the same system of reasoning, every stranding would confer the same right; as the time of disentanglement from such a peril, is ever a matter of uncertainty. Before we could yield our assent to the rule thus literally expounded, the words, "and the time when she will be restored to him in a state to resume the voyage is uncertain," must be stricken out, and their place supplied by the following insertion: "and that she will, be restored to him in a state to resume the voyage, is highly improbable." But we must not be understood, as recognising this literal and forced construction of an isolated section of the court's opinion. It is manifestly contradicted both by what precedes and follows the introduction of this clause: mere stranding being in *limine*, alleged to be no ground for abandonment, and the first sentence that follows the rule, and which was designed to illustrate and announce its true meaning and operation, and the ground upon which it was predicated, declares, "that in such a case the law deems the ship, though having a physical existence, as ceasing to exist, for purposes of utility, and therefore subject to be treated as lost." Could such an absurdity be imputed to the law, that it should deem a ship as ceasing to exist for purposes of

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utility, and be treated as lost, because she was grounded on a beach, from which she would be extricated by the first favorable change of the wind? Such was the condition of the ship, now the subject of litigation, at the time she was seen by those whose reports of her disaster reached the owner, and formed the ground of his abandonment. But it is an useless consumption of time, to inquire whether the facts relied on in the second, third, and fourth prayers of the appellants, in contemplation of law, amount to a total loss. They were not made the grounds of abandonment, nor are they consequences to have been anticipated, as necessarily flowing from them: the offer to abandon, having failed to show the condition of the ship desperate, her total loss, in the natural course of things, inevitable, or “in the highest degree probable,” was wholly invalid, and consequently, the very *substratum* of the plaintiff’s action having failed, all prayers sanctioning his right to recover for a total loss, were properly rejected by the court.

Having disposed of the first branch of this case, the only remaining inquiry is, has the appellant any just reason to complain of the instruction given by the court to the jury. To justify the reversal of a court’s judgment, on the ground of their having given an erroneous instruction to the jury, it must be made appear, that the appellant actually, or probably, did sustain an injury thereby. No matter how erroneous the instruction, if it could work no prejudice to the appellant, it forms no ground for reversal. So far from the appellant being prejudiced by the court’s instruction, it conferred on him an essential benefit, to which, in our view of the subject, he was not entitled. It permitted the jury, upon a state of facts which they were left at liberty to find, to give the appellant a verdict as for a total loss, whereas the direction ought to have been, that from the insufficiency of the abandonment, they were not authorised to give such a verdict, no matter what the proof might be. Therefore, although we disapprove, in part, of the instruction given to

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the jury by the court below, we deem it no fit subject of complaint to the appellant.

Concurring with the County Court in their rejection of the appellant's four prayers, in the second bill of exceptions, and seeing no ground of reversal in their instruction to the jury, we affirm the judgment.

JUDGMENT AFFIRMED.

Note.—After the verdict in this cause, the plaintiff moved for a new trial; and filed in court as the foundation of that motion, the depositions of nine of the jurymen,—declaring, that they had considered in making up their estimate of the plaintiff's damages, that he had received the proceeds of the sale of the ship *General Smith*, at or about the time of her being sold by the Marshall, in July 1823, and that he had been accordingly charged with interest upon such proceeds, from the supposed time of its receipt by him, until the rendition of the verdict, and that they believed the other jurors acted upon the same views.—The fact was, that the plaintiff received those proceeds in 1827. The motion for a new trial was resisted, upon the principle, that the deposition of a juror, was not competent evidence to prove this mistake; and the whole subject was most elaborately discussed.

The County Court, ARCHER, J.—I have carefully examined the cases cited in the argument of this case, and am of opinion, that the testimony of jurors cannot be heard to impeach their verdict, whether the conduct objected to in the jury, be misbehaviour or mistake. The New York cases are full to this point—so are the cases in England, since the revolution, though very contradictory before that period. The cases in 2 T. R. in 6 *Cowan*, and 1 *Wendall*, decide, that no evidence can be received from the jury, to show mistake. I think these decisions right, because, were the law different, an inquisition might be instituted in every case, into the grounds and motives of a jury for their finding, in order to ascertain whether, in coming to given conclusions, they had not mistaken facts. Verdicts of juries, would then in all cases, be uncertain. To permit such inquisition into the motives of juries, would, it appears to me, be against public policy, and lead more frequently to the prostration of justice, than to its preservation.

Independent of the above ground, I should be opposed to a new trial in this case. Treating the loss of the plaintiff as partial, and not as total, (for with this branch of the jury's finding, no fault has been found,) I am not satisfied that injustice has been done to the plaintiff. He has obtained a verdict for \$5786, and has received \$4692 from the sale of the vessel, making in all, the sum of \$10,478.—Now when the probable deterioration of such a vessel, on such a voyage, is taken into consideration, I am by no means clear, that the indemnity of the plaintiff has been inadequate. Besides, considering this as a partial loss, the time when Mr. Bosley received the pro-

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ceeds of the sale, would seem to be entirely immaterial to any just determination of the case,—for if the loss were partial, the property in the vessel and its proceeds always remained in him, and he might employ them, or let them remain idle, without at all affecting the subject matter of inquiry here.

The motion for a new trial is overruled.

JAMES FLACK vs. CHARLES GREEN.—*December, 1831.*

The promissory note of I, endorsed by G and P, fell due at *Washington*, on the 6th, where payment was then demanded, and refused. The notices to the endorsers were enclosed in a letter addressed to P, at *Baltimore*, and mailed at *Washington* on the evening of the 6th. The mail left *Washington* every morning, and arrived at *Baltimore* at an early hour the same afternoon. Both the endorsers lived in *Baltimore*, and notice was delivered to G, the first endorser, on the 9th. **HELD**, that G was discharged from his liability as endorser, the notice being one day too late ; in legal presumption the notice reached P on the 7th.

After evidence had been given, that a letter containing two notices for endorsers upon a dishonored note, had been mailed under cover to one of them, at W, directed to B, where they both resided, it was proposed to prove, that it was the invariable and uniform practice of the endorser's house and counting room, to which the notices had been directed, to forward such notices immediately upon the receipt of them, and the witnesses who were employed in such counting room, had no doubt, and believed, from the course of their business, that they had forwarded one of the notices to the other endorser. **HELD**, that the proposed evidence was incompetent, to prove the delivery of a notice in due time to the other endorser.

No person can become a party to a bill, unless his name appears on some part of it.

One whose name is not upon a bill, though interested in it, is not entitled to the benefit of the rule, that each party is entitled to an entire day, for the purpose of giving notice to the person preceding him, on a dishonored note or bill.

APPEAL from *Baltimore County Court*.

Assumpsit by the appellant, as endorsee, against the appellee, as the endorser of a promissory note for \$482 80, dated *Washington*, March 3d 1825, payable at eleven months, of which one *John Pic*, of that place, was the maker. The general issue was pleaded.

1. At the trial the plaintiff proved the endorsement of *Charles Green*, who resided in the city of *Baltimore* at the time the note became due; and also proved the signature of said *Pic*, the maker; and then read in evidence the testimony of *John G. McDonald*, notary public, residing in the city of *Washington*, taken under a commission issued for that purpose, viz: "I find by reference to my notarial book, that a similar note to that now exhibited to me, marked A, was delivered to me by the *President and Directors of the Bank of Washington*, to be presented for payment, to the drawer thereof, and that after the hour of three o'clock in the afternoon, on the 6th day of February, 1826, I presented the said note for payment, at the store of *John Pic*, in *Washington* city, and demanded payment of it, and was answered by a lady officiating therein, and believed by me to be the wife of the said *John Pic*, that *Mr. Pic* was not within, and that it could not be paid. I then prepared a notice of the non-payment, addressed it to *Charles Green*, and a similar notice addressed to *Henry Payson & Co.* the second endorsers on the note; which notices I enclosed and put into the post office in the city of *Washington*, on the evening of the same day, addressed to *Henry Payson & Co. Baltimore, Maryland*; the next morning I returned the note to the *President and Directors of the Bank of Washington*, accompanied with the protest made by me." And for the purpose of shewing that the notice of non-payment addressed to *Charles Green*, the defendant, and mailed at *Washington*, on the 6th day of February, 1826, under cover to *Henry Payson & Co.* the next succeeding endorsers to the said defendant, as set forth in the evidence of *John G. McDonald*, was transmitted to the defendant in due time, the plaintiff offered to prove by *Henry P. Sumner*, a member of the mercantile house of *Henry Payson & Co.* that it was the invariable and uniform practice of that house, to forward such notices immediately upon receipt of them, and that he had no doubt, from the course of their business, that they had forwarded this particular notice to *Charles Green*,

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but that he had no recollection upon the subject of forwarding this particular notice to the defendant. That from the general course of their business, and from the particular custom of their counting house, in respect to such notices, he believed that the notice in question had been duly transmitted to the defendant. And the plaintiff further offered similar evidence, by all the clerks of the house of *H. P. & Co.* To this evidence the defendant objected, as being incompetent, and inadmissible to prove that notice of the non-payment of the said note was received by, or^g given to, the defendant: which objection the court (*ARCHER*, Ch. J.) sustained, and refused to permit the said evidence to be given to the jury. The plaintiff excepted.

2. In addition to the testimony given in the preceding bill of exceptions, and which is hereby made a part of this exception, the plaintiff still further to support the issue on his part, proved by *Henry W. Kiser*, a legal and competent witness, that the following notice—

Mr. Charles Green,—"Baltimore, 9th February, 1826. Dear Sir: The note of *John Pic*, for \$482 80, of your endorsement, has come to hand protested. I now feel you, as the endorser, bound for the payment of the note, and I shall hold you as such, and shall expect the payment of the same in the course of to-day or to-morrow. *James Flack*." is in his hand writing, and that at the time it bears date, he was a clerk in the employ of the plaintiff, and that by the direction of the plaintiff he delivered a notice, of which the above is a true copy, on the 9th of February, 1826, at the store of *Coley and Green*, of which firm the said defendant was a partner. And the plaintiff then proved by *Henry P. Sumner*, that soon after Messrs. *Flack & Co.*, of which firm the plaintiff was a partner, became known to *Henry Payson & Co.* Mr. *Samuel B. Coley*, the partner of the plaintiff, stated, that from the nature of their business as brewers, or mixers of liquors, and manufacturers of cordials, that they would require foreign liquors and wines, to

use in their establishment, and that he stated at the same time, that they were strangers in *Baltimore*, and did not wish to keep a bank account, and would therefore wish *Henry Payson & Co.* to collect their bills receivable, and that in purchasing such articles as suited their business, they would buy from *Henry Payson & Co.* when they could get them upon as favorable terms as from other persons; that after such understanding, the house of *James Flack & Co.* dealt largely with *Henry Payson & Co.*, purchasing various articles of merchandise, on credit, and placing with them various promissory notes, from time to time, as they received them in the course of their business; that *Henry Payson & Co.* occasionally advanced sums of money to said *Flack & Co.* as they required them, which they so advanced, as well for their personal confidence in *Flack & Co.* as in the faith of the said notes, which they had deposited with them in the course of their dealings as aforesaid. And also proved by the same witness, that the amount of notes credited *Flack & Co.* in their account current with the house of *Payson & Co.*, included the note on which the present suit is instituted; and that the charge therein afterwards stated of the said note, to the debit of *James Flack*, was in consequence of the said note having been returned protested for non-payment, by the drawer, who resided in the city of *Washington*, and that the dealings of the said house of *Henry Payson & Co.* with *James Flack*, continued after the dissolution of the partnership of *James Flack & Co.*, without any new understanding between them as regards advances, and that such advances were made after such dissolution, in the same manner as before; that they kept a mutual interest account with each other, both before and after the dissolution aforesaid, and that from the nature and course of their dealings with the said house of *Flack & Co.* and with the said plaintiff, after the dissolution aforesaid, they considered themselves as the bankers of the said *Flack & Co.* and of the plaintiff, after the dissolution aforesaid; and the said witness being asked by the counsel for the defen-

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dant, to give a definition of the word "banker," as he applied it to this particular case, stated, that he meant thereby to express "a sort of combined agency in the purchase of goods, and collection of notes, and making advances of money." It was proved on the part of the defendant, by the cross examination of the said witness, that *Henry Payson & Co.* when they received the notes for collection from *Flack & Co.*, placed them in their books as bills receivable, and when they were paid, placed the amount thereof to the credit of *Flack & Co.*; that *Henry Payson & Co.* did not consider themselves in any way bound by the receipt of such notes, unless the money due on them was paid at their maturity; that all the expenses of collecting said notes were paid by *Flack & Co.*; that no advance was made by *Henry Payson & Co.* on the note on which the suit was brought, and that if the same had been paid at maturity, and *Flack* had called for the money paid thereon, it would have been given to him as his own money; and that if the note had not been paid, and *Flack* had asked for the advance of that amount of money, it would have been given to him on his personal credit; that *Henry Payson & Co.* were not in the habit of receiving notes for collection from persons residing in the city of *Baltimore*, and that witness had no knowledge that any other note was placed in the hands of *Henry Payson & Co.* for collection, except those received from *Flack & Co.*, and that they were not the bankers of any other house in the like manner in which they were the bankers of *Flack & Co.*; and further proved, that the store of *Coley and Green* was about five hundred yards distant from the store of *Flack*; and further proved, that the said note was not endorsed by *James Flack*, the plaintiff, at the time it fell due; and that the mail from *Washington* for *Baltimore*, left the former place early in the morning, every day for the latter, where it arrived at an early hour in the same afternoon: whereupon the defendant prayed the court to instruct the jury, that the plaintiff is not entitled to recover, and assigned the following reasons: 1. That the

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plaintiff had not used due and resonable diligence in the delivery of notice to the defendant, of the dishonor of the note on which this suit was brought. 2. That such notice being delivered on the 9th of February, 1827, was one day too late; and 3. That there was no evidence of notice, to charge the defendant as endorser of the note on which this suit was brought; which instruction the court (ARCHER, Ch. J.) accordingly gave.

The plaintiff excepted, and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J., EARLE, STEPHEN, and DORSEY, J.

Johnson, for the appellant, cited *Miller vs. Hackly*, 5 Johns. 375. *Pritt vs. Fairclough, et al.* 3 Camp. 305. *Hagedorn vs. Reed*, *Ib.* 379. *Scott vs. Lifford*, 1 *Ib.* 246, 249. *Chitty on Bills*, 213, 225, 318, 319. *Longdale vs. Trimmer*, 15 *East.* 291. *Mead and Rogers vs. Engs*, 5 *Cow.* 303. 3 *Kent*, 73.

Gill, for the appellee, cited, *The Cumberland Bank vs. McKinley*, 6 *Harr. and Johns.* 527, 3 *Kent*, 46, 75, *Chitty on Bills*, 22, 23, 316. *Bank of Columbia vs. Magruder*, 6 *Harr. and Johns.* 181. *Bank of Columbia vs. Fitzhugh*, 1 *Harr. and Gill*, 248. *Vincent vs. Harlock, et al.* 1 *Camp.* 442, 443, note 1. *Smith vs. Mullett*, 2 *Camp.* 208. *Darbishire vs. Parker*, 6 *East.* 5, 6, 7. *U. States vs. Barker*, 12 *Wheat.* 560. *Morgan vs. Woodworth*, 3 *Johns. Cas.* 89.

STEPHEN, J., delivered the opinion of the court.

This suit was instituted in *Baltimore County Court*, by the appellant, against the appellee, upon a promissory note drawn by a certain *John Pic*, in favor of the appellee, by whom it was endorsed to the appellant. The general issue was pleaded, and on the trial of the cause, the plaintiff proved the endorsement of the payee on the note, who re-

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sided in the city of *Baltimore* at the time the note became due, and also the hand writing of the maker. *John Pic*, the maker of the note, residing in the city of *Washington*, the note was transmitted to the bank of *Washington* for collection, by *Henry Payson & Co.* of *Baltimore*, as the agents of *James Flack*, by whom it had been placed in their hands, for a similar purpose. When the note became due, it was placed by the bank, in the hands of a notary, who demanded payment thereof, which being refused, he prepared a notice thereof, addressed to *Charles Green*, and a similar notice addressed to *Henry Payson & Co.*, who were endorsers on the said note; which notices the notary endorsed, and put in the post office, in the city of *Washington*, on the evening of the same day, addressed to *Henry Payson & Co.* at *Baltimore*. In this case, two bills of exceptions were taken in the court below. In the first exception, for the purpose of showing that the notice of non-payment, addressed to *Charles Green*, the defendant, and put into the post office at *Washington*, on the 6th February, 1826, the day the note became due, under cover to *Henry Payson & Co.* the next endorsers, was transmitted to the defendant in due time; the plaintiff offered to prove by sundry witnesses, that it was the invariable, and uniform practice of that house, to forward such notices immediately upon receipt of them, and that they had no doubt from the course of their business, that they had forwarded this particular notice to *Charles Green*, the defendant, but that they had no recollection upon the subject of forwarding this particular notice to the defendant. That from the general course of their business, and from the particular custom of their counting house, in respect to such notices, they believed the notice in question had been duly transmitted to the defendant. To this evidence the defendant objected, as being incompetent, and inadmissible to prove that notice of the non-payment of the said note was received by, or given to him; which objection the court sustained, and refused to permit the said evidence to be given to the jury.

In this opinion of the court we do not think there is any error.

In the opinion given by the court in the second exception, we also entirely concur. The note became due on the 6th February, 1826, and the proof offered in this exception established the fact, that *Green*, the defendant, never received notice, until the 9th of that month, which was unquestionably one day too late. The name of *Flack* was not endorsed upon the bill; and in *Chitty on Bills*, 23, the principle is stated to be a general one, "that no person can become a party to a bill, unless his name appears on some part of it." For this rule he refers to the opinion of *Buller*, in the case of *Fenn vs. Harrison*, in 3 Term, 759, where he says: "In the case of a bill of exchange, we know precisely what remedy the holder has, if the bill be not paid. His security appears wholly on the face of the bill itself. The acceptor, the drawer, and the endorsers are all liable in their turns, but they are only liable, because they have written their names on the bill." The law seems to be well settled, that where all the parties reside in the same place, each party has a day to give notice. In 1 *Wheat. Selw.* 295, the law is laid down to be, "where there are several endorsements, and the holder gives notice of dishonor to his endorser, neither that endorser, nor any prior endorser is bound to transmit the notice of dishonor on the very day on which he receives it. Each successive endorser will be considered as having used due diligence, if he transmit the notice of dishonor, on the day after it is received, in a case where all the parties live in the same place; but if he neglect giving the notice on that day, and the day after, it will be too late." In *Jameson vs. Swinton*, 2 Camp. N. P. C. 373, the same rule was recognized by LAWRENCE, J. viz: "that each party to the bill has a day to give notice." The name of *Flack* not being upon the bill in this case, he was not entitled to the benefit of the principle, that each party is entitled to an entire day for the purpose of giving notice.

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“The putting of a letter into the post office, giving the notice, is sufficient, without proof of its having been actually received, and if the party to be affected with the notice, reside in a different place from the holder, the notice may be sent through the post office, to the post office nearest the party entitled to such notice;” 1 *Wheat.* 298. *Bank of Columbia vs. Magruder*, 6 *Harr. and Johns.* 181. According to the admission of the parties, it appears, that the mail left *Washington* city early in the morning, and arrived in *Baltimore*, at an early hour the same afternoon. In legal presumption, the notice must have reached *Payson & Co.* on the 7th February, who were legally bound to deliver notice to *Green* on the following day. This not having been done, we are of opinion, that the court below were right, in the opinion expressed by them in the second exception, and affirm their judgment.

JUDGMENT AFFIRMED.

JOSHUA COCKEY vs. JONATHAN FORREST.—December, 1831.

Z being insolvent, and desirous to raise money, applied to F, and obtained his promissory note for \$250, payable 60 days after date to Z, for the purpose of selling it to raise money. No consideration was paid for the note. Z endorsed the note in blank, sold and delivered it to the plaintiff, who was ignorant of its being an lent note, for the sum of \$200. The maker of the note was in good circumstances. HELD, that this note was usurious and void.

APPEAL from *Frederick County Court.*

Assumpsit by the apellant, the endorsee, against the apellee, the maker of a promissory note.

At the trial the plaintiff offered in evidence the following promissory note, the hand writing of the drawer and endorser being admitted; viz:

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“\$250. *Westminster*, February 26th, 1827. Sixty days after date, I promise to pay to the order of *Wm. Zollickoffer*, two hundred and fifty dollars, for value received. *Jonathan Forrest*. Endorsed,—Pay the contents to *Joshua Cockey*. *Wm. Zollickoffer*.” And then read in evidence by agreement, the following statement of facts. It is admitted that the note upon which this suit is brought, was executed by the defendant, whose name is signed thereto. That *Wm. Zollickoffer* wished to raise money, and not being able to do so upon his own note, he being insolvent, applied to the defendant, and obtained the note in question, for the purpose of selling to get money. That the note was executed for the purpose of selling, and without any consideration. That *Zollickoffer* sold the same to *Cockey*, the plaintiff, for two hundred dollars, and endorsed and delivered it to him in blank. The words “pay the contents to *Joshua Cockey*,” were put there by the plaintiff’s counsel before the suit was brought. It was also admitted that the defendant, at the time said note was executed, and endorsed to the plaintiff, was, and now is, in good circumstances as to property, and abundantly able to pay the amount therein expressed; and that *Zollickoffer* was, and still is insolvent. That the plaintiff had no notice, or knowledge, that said note was an accommodation note, given to raise money. Upon this statement, the defendant prayed the court to instruct the jury, that the plaintiff was not entitled to recover upon the ground, (according to an amendment of the record made by consent, upon the argument of the cause in the Court of Appeals,) that said note was avoided by the statute against *usury*. The County Court gave the instruction as prayed. The plaintiff excepted, and the verdict and judgment being against him, he prosecuted the present appeal.

The cause was argued before STEPHEN, ARCHER, and DORSEY, J.

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Ross, for the appellant, contended,

That an accommodation note is a legal instrument, and is not void in its inception for the want of consideration. It is an accommodation note only as between the original parties; to all others, it is a business note, *unless they had notice of its origin*: it is a binding security against the drawer, as to all persons not privy to the original transaction. The drawer, by delivering it to the payee, puts it into circulation as his valid note: it would be a gross fraud on the public, to permit him to say otherwise. Nothing (*as it respects third parties*,) can discharge him from its obligation, but payment, or release; neither want of consideration, nor fraud, can be alleged against the holder. 5 *Rand.* 425. 1 *Serg. and Low.* 74. As long as the drawer held the note in his hands, it was an inchoate and imperfect note. It takes effect from delivery. When the drawer delivers it to the payee, that gives it a legal existence. It was the delivery, then, of this note to *Wm. Zollickoffer*, that made it the note of *Jonathan Forrest*: that was its inception; and no usury having taken place at that time, it was not void in its commencement. 8 *Cow.* 706. The character the note received at its birth, it retains through life; what it was then, it is now; if it were free from the taint of usury in its origin, no subsequent contract can affect it. 1 *Peters' S. C. Rep.* 43. It was not contended below, nor could it be, that there was any design, between the drawer and the payee, to evade the statute of usury; nor that the transaction was a loan of money in any form. It was not obnoxious to the charge of usury, as it respects the transaction between *Forrest* and *Zollickoffer*: between them it was an *abstract* accommodation note. The question now arises, was it usurious, as it relates to the transaction between *Zollickoffer* and *Cockey*. If the note upon its delivery by *Forrest* to *Z.* was a valid contract, and not usurious, then no subsequent contract can taint it with usury. The court below thought that it was brought into legal existence by the transaction between *Zollickoffer* and *Cockey*, and

that the payment of the \$200, must be regarded as a loan, and not as a purchase of the note. That the payment of the \$200 was a loan, is an inference the court drew from the position they assumed, that the note had no legal existence as a contract, until the transaction between Z. and C. made it such, and rested this opinion upon the authority of *Sauerwine vs. Brunner*, 1 *Harr. and Gill*, 477, which they considered as a parallel case, and conclusive upon the subject. With great deference to the court, the appellant's counsel thinks the case of *Sauerwine and Brunner* differs in its circumstances essentially from the case at bar. In that case, *Brunner's* note was drawn in blank, without the name of the payee inserted in it, and offered in this situation to *Brown*, who inserted therein his own name, as payee. Application was made to *Brown*, by *E.* for a loan of money; and *Brown* did loan the money to *E.* on the note; it was first negotiated for the purpose of raising money, at usurious interest; none of these facts, which are all important, exist in the case at bar. The note had all the characteristics of a consummate note; no blanks to fill; no application made by Z. to C. for a loan; no money paid by C. to Z. as a loan. The application made by Z. to C., was to sell the note, and the payment made by C. to Z., was the consideration of the purchase of the note, and these facts admitted in the case stated, and upon a case stated, as upon a special verdict, the court is to declare the law on the facts stated, and are not at liberty to infer facts. 2 *Harr. and Gill*, 114, 320. But the leading distinction between the case of *Sauerwine and Brunner*, and the case at bar, rests upon the knowledge of the parties as to the origin of the note. *Brown*, when the note was offered to him in blank, and when he inserted his own name therein, as payee, knew it was not a business note; he knew *Brunner* did not owe him the money, and when *Eichelberger* made application to him for a loan, he must have known it was a note drawn by *Brunner* for the accommodation of *Eichelberger*, and that when he discounted it, and not before, it was

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brought into legal existence. He knew he was not buying a subsisting security sent into market for sale, for he could not buy that, what had no legal existence. In the case at bar, it is admitted, that *Cockey* had no notice or knowledge of the transaction between the original parties. The note is offered to him by *Z.*, the payee, as his property, to whom, as a business note, it properly belonged, and he takes it upon the credit of the names upon it, and gives credit to the representation that the drawer himself gives to the note, through the medium of his signature. If this be not a valid note, it is a gross fraud, practised upon *Cockey* by *Forrest* and *Zollickoffer*, and justice will not permit *Forrest* to defeat his own note, and to injure a person who advanced money upon the faith of the representation of the contract, as made by *Forrest*, through the medium of his signature. To sustain the opinion of the court below, that the note of *Forrest* was not an operative note, and not brought into legal existence until it was delivered by *Zollickoffer* to *Cockey*, can only be supported by the assumption of a fact negatived by the case stated, to wit, "the knowledge of *Cockey*, as to the origin and history of the original transaction." The case of *Sauerwine vs. Brunner*, and the *New York* cases cited in support of that decision, are all founded upon the fact, "that the lender of the money knew the purpose for which the paper was created;" and in *Sauerwine vs. Brunner*, and the *New York* cases, such knowledge appeared as part of the case. In most of those cases, the note was offered by the drawer, or his agent, for discount, which constructively informed the person to whom it was offered, that it was an inchoate and imperfect note; it was the note of the drawer himself, until delivered. It is a familiar principle of law, applied to deeds, and other instruments, that they take effect from delivery. It was not the drawer's note, until he delivered it to the lender of the money; that was its inception: but in the case at bar, *Forrest*, the drawer, did not offer the note for sale, or discount; it was not in his possession, nor under his con-

trol. He delivered it, as his act and deed, to Z., and by his delivery of it to Z., he imparted to it all the essentials of a valid and perfect contract, to wit, signing and delivery. The want of consideration, he may offer as evidence against Z.; this admits the note valid as to its execution, and is offered only in avoidance. It admits the legal existence of the note; and if the legal existence of the note is established, F. cannot avoid it as to strangers, upon the ground of want of consideration. *Sauerwine vs. Brunner*, and *Bennett vs. Smith*, 15 Johns. 355, are the only cases where, as the case at bar, the payee held and offered the note for discount or sale; and in the first case, *Brown*, to whom it was offered, must, from the facts in the cause, have known the purpose for which the paper was created; in the latter case, it was given in evidence, that the drawer gave the notes to the payee, for the purpose of being discounted, at an usurious interest, thus shewing it had its origin in usury. In those cases, the court decided the parties had notice of the origin of the transaction; in the case at bar, it is admitted he had no such knowledge; that knowledge is always of the essence of usury, and that the courts of *New York* decided upon this principle, in 4 Cowen, 279, they say,—“admitting that this principle may be applicable to specialties, as well as to negotiable paper, it must be with the qualification, that the person purchasing knew that the specialty was not operative, being made for the purpose of raising money.” And in 8 Cowen, 689, *Powell vs. Waters*, it is said, *Parish* had *prima facie* evidence that the note was for discount, and not a business note. The application to *Parish*, was to discount for the drawer; if he had inquired into the origin of the paper, he might have discovered the fact, that the note had never been discounted; it was an inchoate and imperfect note, until it was delivered by the drawer; it was the drawer’s note when offered to *Parish*.

The courts of *Virginia*, in *Gilmor*, 42, and 5 Rand. 333, have decided, “that a note made for the accommodation of

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the payee, may be sold at a greater premium than legal interest; and if the purchaser had no knowledge that it was an accommodation note, it is not usurious. A man may take a bill of exchange, or note, to market, and sell it (if there be no shift, or device, to cover a discount,) for any price which he can obtain for it; and though the price which he obtains, bears no proportion to its value, the purchaser nevertheless would not be guilty of usury. It might be otherwise if the seller indorsed the bill, and remained liable to be sued upon it; it would then be for the consideration of a jury, whether the bargain and sale was not a shift for a loan; for it cannot be too often repeated, that to constitute usury, there must either be a direct loan, and a taking of more than legal interest, for the forbearance of payment, or there must be some device for the purpose of concealing or evading the appearance of a loan, and forbearance, when, in truth, the transaction was a loan. 3 *Serg. and Low.* 93, note 13. 4 *East's Rep.* 57. In the case at bar, the case stated, is, as it were, the special verdict of the jury, and they say the bargain and sale was not a loan, but that Z. sold the note to *Cockey*, and *Cockey* admitting it was a purchase by him of the note, without resort, and not a contract of indorsement, precludes the idea that Z. remained liable to him on his blank indorsement. And in *Wiffen vs. Roberts*, 1 *East's Rep.* 261, in an action by the indorser, against the drawer of a bill of exchange, accepted by one *Yates*, the defence set up was, that the bill was an accommodation one, and that the defendant had not paid the full value for it. *Lord Kenyon* said, that when the bill is drawn in the regular course of business, the indorsee shall recover the full amount of the bill; but when it is an accommodation note, and that known to the indorsee, and he pays but part of the amount, in such case he can duly recover the sum actually paid; and this case of *Wiffen vs. Roberts*, is recognised in 7 *Johns.* 361, 13 *Johns.* 52, 15 *Johns.* 56; and the same principle is adopted in a late case of *Davison vs. Franklin*, 20 *Serg. and Low.* 363, where the chief jus-

tice says,—I will not make the rule absolute, to set aside a judgment given to secure a gaming debt. “If we made this rule absolute, we should enable the defendant to defeat the judgment by his own fraud and misconduct, and to injure a person who advanced money upon the faith that his representation was true.” I think we shall best ensure the end of justice, by directing the judgment to stand for the sum actually paid, if, upon inquiry, any was paid. And *Ashhurst, J.* in 2 *Term*, 72, lays it down as a broad, general principle, that “whenever one of two innocent persons, must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must sustain it.” *Forrest*, by giving *Z.* his unqualified note, enabled him to offer, and to sell it to *C.* as a valid note; he has, by this act of fraud or misconduct, enabled *Z.* to deceive and to injure *C.*; and if a loss must be sustained, *F.* must sustain it: as to the extent, whether to the full amount of the note, as the sum actually paid, the court, by their decision, have rendered it unnecessary to discuss. If chief justice *Gibbs*, in the case of *Jones vs. Davison*, 3 *Serg. and Low.* 93, could never understand the equity of the rule, “that an innocent indorsee shall be prevented from recovering upon a bill of exchange, which has been contaminated in its creation with usury, by means to which he is not privy, and of which, when he receives the bill, he can know nothing;” the court of *Frederick* county, by their decision in the case at bar, have fixed and settled a rule of more difficult solution. They have said, that an innocent purchaser of a note, not contaminated in its creation with usury, shall not only be prevented from recovering upon a note thus purchased, but he shall be a usurer, and suffer the penalties of the statute of usury. It is the adoption of a rule, that changes the character of moral action, and stamps innocence with crime. The court below, by their decision, have sustained the defence of the defendant, and by their judicial act, have pronounced the note upon which this action was brought, usurious, and that *Joshua Cockey* must not only lose his money, but be ob-

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noxious to the penalties of the law. Should the Court of Appeals affirm the judgment of the court below, they will judicially declare, that an accommodation note, if purchased by an innocent purchaser, from the payee, without notice of its origin, for a sum less than the sum appearing on its face, the purchaser shall not only suffer the pecuniary loss of the sum he paid first, but he shall suffer also the penalties of the statute of usury.

Palmer, for the appellee.

The question is, was the note negotiated upon a usurious consideration. The rule is, that all contracts which are substantially usurious, are void, no matter what means or terms are employed to avoid the statute.

It is admitted, that a *bona fide* purchaser of a note, or bond, will be protected, though he gives less than the amount it expresses; but it must be an actual purchase, and its payment must not be guaranteed by the seller. If it is so guaranteed, or the note indorsed by the borrower, it is no sale, but a loan of money. This is stronger than the case of *Sauerwine vs. Brunner*, 1 *Harr. and Gill*, 477, because in that case, the note was in the hands of a *bona fide* holder, whilst here it is in the hands of the usurer. He referred also, to 7 *Johns.* 26. 1 *Mass. Rep.* 217. 1 *Wm. Blk.* 445.

The court considering this case decided by *Sauerwine vs. Brunner*, 1 *Harr. and Gill*, 477,

AFFIRMED THE JUDGMENT.

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CHARLES CARROLL of Carrolton, vs. MARSHAM WARING,
et al.—June, 1832.

Since the passage of the act of 1785, ch. 72, sec. 25, the practice of the Court of Chancery in *England*, in the case of a plea ruled to be sufficient, when set down for argument, to make the complainant pay £5 costs, is repealed, and a fine should be paid only by the party pleading or demurring, whose plea or demurrer is overruled.

Where it fully appears, upon the face of a complainant's bill, that there had been a sufficient lapse of time to make the bar created by the Act of Limitations, a defence to the suit, it is not necessary to verify the plea of Limitations by an oath; nor is it necessary to support such a plea by an answer, where there was nothing charged in the bill in avoidance, or which could take the case out of the Statute of Limitations.

The payment of interest upon a *bond*, is no avoidance of the Act of Limitations, of this State, nor will even an express acknowledgment of the debt revive the remedy upon a *bond* barred by that act.

APPEAL from the Court of Chancery.

The case is sufficiently stated in the following opinion, delivered by his honor, BLAND, chancellor, at December session, 1830.

This case standing for hearing, as to the sufficiency of the several pleas of the defendants, heretofore filed, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

The plaintiff, *Carroll*, by his bill, filed on the 24th of February, 1830, states, that *Thomas S. Lee* being indebted to him on the 21st of April, 1798, in the sum of £3,000 sterling, he, with *Marsham Waring*, and *Notley Young*, as his sureties, bound themselves in a joint and several bond of that date, conditioned for the payment of that sum, on demand, with interest from the 23d of November next before the date of the bond. That he sued, and recovered judgment on the bond against *Waring*, at April Term, 1810; that *Waring* by his will, dated on the 17th of May, 1812, gave all his estate, real and personal, to his son, *Marsham Waring*, and soon after, in the same year, died; that the late *Marsham Waring* left a large amount of property, but

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that the whole of his real estate had been exhausted since his death, in making satisfaction of a debt with which he had encumbered it, by a deed prior to the judgment against him; that *Notley Young*, the other security in the bond, died some time in the year 1798, leaving a large amount of property; that his personal estate is insufficient to pay his debts; that his executors are also dead, and that administration *de bonis non*, with the will annexed, has been granted on his personal estate; and that the greater part of the interest on said bond has been paid him; but that all of the principal, and a part of the interest, is still due. Upon which the bill prays, that the executor of the late *Marsham Waring*, and the administrator of the late *Notley Young*, may account, respectively, for the personal assets which had come to their hands; that the real estate of the late *Notley Young*, may be sold, to pay the plaintiff and his other creditors, and that process may issue against the executors, the administrator, and the heirs and devisees of the late *Marsham Waring*, and the late *Notley Young*, therein named as defendants. The bill says nothing of the situation of *Thomas S. Lee*, the principal debtor, nor is he made a party to the suit. On the 27th of September, 1830, *Robert Y. Brent*, the administrator of the late *Notley Young*, filed his separate plea of the statute of limitations, in bar of the whole cause of action, relying on the facts as stated in the bill, that the bond, or thing in action, had been more than twelve years standing prior to the institution of this suit; and on the same day *Marsham Waring*, the devisee of the late *Marsham Waring*, and *Notley Young of Ben.*, and *Eleanor Clagett*, two of the heirs or devisees of the late *Notley Young*, filed their joint and several plea of the statute of limitations, in bar of the whole cause of action, in which they rely on the facts set forth in the bill, that the bond, as well as the judgment against *Marsham Waring*, this defendant's testator, or those things in action, had been more than twelve years standing, before the filing of this bill. And on the 29th of July, 1830, *Marsham Waring*,

the executor, filed his separate plea of the statute of limitations, in bar, relying on the facts as stated in the bill, that the things in action, the bond and the judgment, against his testator, had been more than twelve years standing before the commencement of this suit. None of the pleas are sworn to, nor any of them accompanied by an answer purporting to be in their support, or by an answer of any kind. Without replying to them, the plaintiff set them down for argument, to obtain the opinion of the chancellor as to their sufficiency; and as to that alone, the parties now ask the judgment of the court.

The plaintiff has objected to these pleas, because they do not negative the savings, as to the impediments of infancy, &c. spoken of in the act of limitations, relied on by them. The act here referred to, is that of 1715, ch. 23, which is so nearly analagous to the *English* statute upon the same subject, that it has been generally construed, and applied, in the same manner. The 6th section, here particularly relied on, is peculiar to *Maryland*. There is no *English* statutory limitation, as to bonds and judgments; but like the *English* statute of limitations, after prescribing a limitation to actions upon those securities, it concludes with a saving in favor of infants, &c. after such impediments are removed. In equity, as well as at law, it has been always held to be sufficient, that the defendant should, in his plea of the statute of limitations, rest upon the fact, that the debt became due, or that the cause of action had accrued, beyond the prescribed time, before the suit was brought, without showing that the case did not fall within any of the savings of the act, which are exceptions in favor of the party suing, and therefore if his case falls within any of them, it is for him, and not the defendant, to show it. There is, therefore, no foundation for this objection to these pleas. The plaintiff has also urged, that these pleas ought not to be received, because they are not on oath; and in reply to this objection, it was contended that this is a creditor's bill, and that in all such cases, the defendant, or any co-creditor, has

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always been allowed to take advantage of the statute of limitations against any claim, merely by filing a note of such objection, without oath; and that for these, and other reasons, apparent upon the proceedings, it was not necessary that these pleas should have been put in on oath. As regards the course of proceeding on a creditor's bill, it is true, that from necessity, in some particulars, and for convenience in other respects, many of the established rules of the court, as between the plaintiff and defendant, have been dispensed with, or put aside, in relation to creditors who come in after the commencement of the suit. As to the claim of the originally suing creditor, the defendant is specially called on to answer by the bill, and therefore, as to the claim so presented, he cannot be allowed to demur, plead, or answer, in any other manner than according to the established course of the court. But the other creditors of the defendant are called on, in general terms, to come in, and file the vouchers of their claims in the chancery office, by a given day; and not being allowed to retard, or incumber the proceedings, with any tedious, or very special allegations, respecting their several claims, it is but reasonable that the defendant, as well as any co-creditor, should be allowed to rely upon the statute of limitations, or any other objection, in opposition to them, in the same summary and informal manner in which the claims themselves have been permitted to be introduced into the cause; hence it has always been deemed sufficient, for a defendant or any co-creditor, to file a short note, in any form, and without oath, of his reliance upon the statute of limitations, in opposition to any such claim. This, however, is a course of proceeding which has been sanctioned, because of the peculiar nature of the case, and can in no respect be deemed a precedent applicable to the case under consideration. It may be regarded as a general rule, in equity, that in all cases where the defendant undertakes to rest his defence upon any matter of fact, not stated in the bill, and only sustainable by proof, other than that of a record, or some pub-

lie testimonial, he must make oath to the truth of the facts he so advances as a defence. And further, that in all cases where the defendant puts his defence into the form of an answer, whether it be confined to that which is strictly responsive to the bill, or contains much matter in avoidance, it cannot be received without being sworn to by him, unless the plaintiff consents to its being filed without oath. Generally, a plea in equity shows some fact, or new matter, not stated in the bill upon which the defendant relies as an excuse, for not answering as the bill requires, and upon which he rests his defence against the relief claimed by the plaintiff; and therefore, in general, all pleas must be upon oath, where the fact relied on is such as must be proved by the testimony of witnesses. If, however, the plea relies upon any public record, or other matter, of which the court must take notice, or which may be shewn by a record, as upon a former decree in relation to the same matter in bar, then, if the decree be enrolled according to the *English* mode, the defendant may make profert of the record, without swearing to the plea, because to the verity of the record, there can be no addition by the defendant's oath; but if the decree be in paper only, so that it cannot be shewn to the court, then the plea must be on oath. *Form Rom.* 56. A plea resting upon a statute alone, is a plea of matter of record; but if it be necessary to couple any mere matter of fact with a statute, in order to constitute or complete defence, then the plea must be on oath, because the defence would be unavailable without an averment of such fact, and the defendant must verify, by his oath, all such facts which he advances as a defence; as where the plea relied on the statute against selling pretended titles, which prohibits all such bargains, except the vendor had been, one year previous to the sale, in possession of the estate, the averment that the plaintiff had not been so in possession, is a fact, without which the statute can be of no avail to the defendant; and therefore, his plea resting so far on a mere fact as well as upon a statute, it was required to be substantiated

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by his oath. *Coop. Rep.* 34. 2 *Ves. and B.* 357. 2 *Harr. Pr. Ch.* 591, 598. A plea is an excuse for not answering as the bill requires, and therefore a defendant cannot, by plea, offer an excuse, and then go on to answer as the bill requires; because, such an answer is an admission that there is no reason why he should not so answer; and therefore, by such an answer, he virtually waives and overrules his plea. But there are many cases in which he must answer certain portions of the bill, in support of his plea, as where a mortgagee files a bill to foreclose, and actually states a case, upon which he might be barred of relief by the statute of limitations; but as it were in anticipation of that defence, alleges that the mortgagor had repeatedly acknowledged the debt to be due, and had made sundry payments within the time which would otherwise have operated as a bar; in such case, if the defendant pleads the statute of limitations in bar, he must support his plea by an answer, denying the acknowledgments and payments alleged in the bill; because if he did not do so, as those allegations would be taken for true, they would take the case out of the statute. This is said to be an incongruous form of pleading; and it is necessary in all cases where there is matter stated in the bill, and not covered by the plea, which would, if not answered and denied, be a sufficient reply to the plea; but here there is no allegation, that any thing has ever been paid on the judgment, and the general averment of the bill, "that the greater part of the interest on said bond has been paid him, but all the principal, and a part of the interest, is still due," without any specification as to the time when such payments of interest were made, is entirely too vague and indefinite, to take the case out of the statute, admitting it to be literally true; and there is no intimation in the bill, of any other circumstances which could prevent the running of the statute against both the bond and judgment. *For. Rom.* 58. *Mit. Pr.* 212. 3 *Atk.* 358. By *Lord Bacon's* orders, it is declared, that "a demurrer is properly upon matter defective, contained in the bill itself,

and no foreign matter ; but a plea is of foreign matter to discharge or stay the suit, as that the cause hath been formerly dismissed, or that the plaintiff is outlawed, or excommunicated, or there is another bill depending for the same cause, or the like ; and such plea may be put in without oath, in case where the matter of the plea appears upon record ; but if it be any thing that doth not appear upon record, the plea must be upon oath." *Beam. Ord.* 26. From which it appears, that the peculiar quality in which a plea essentially differs from a demurrer, is, that a plea rests on some new matter, not set forth in the bill ; whereas, a demurrer is founded exclusively upon the matter apparent on the face of the bill : a plea admits the truth of those facts only of the bill, which are not covered by it,—but a demurrer admits the truth of the plaintiff's whole case, and only denies that he is in equity entitled to the relief he asks, even supposing all the facts stated by him to be true ; hence a demurrer is never required to be sworn to, because it neither controverts any facts stated by the plaintiff, nor advances any new matter of fact, the truth of which may be denied, or put in issue. *For. Rom.* 93. It is also declared by *Lord Bacon's* rules, that where any suit appears upon the bill to be of the nature of those which are regularly to be dismissed, such as bargains at play, or wages, or bargains for offices, &c. such matter is to be set forth by way of demurrer, *Beam. Ord.* 27 ; and hence, as it would seem, it has become a general rule, that a plea to be good, must state some new matter, which is a bar of the plaintiff, and not like a demurrer, rest on facts in the bill ; but if, instead of doing so, the defendant relies, by way of plea, altogether on the facts apparent on the face of the bill, as a bar, the plea will be overruled ; because the bill being open to a demurrer, a plea cannot be resorted to upon such ground, as a defence. 1 *Mad. Rep.* 228. 2 *Mad. Rep.* 8. *Mit. Pr.* 235.

But although a plea is generally expected to advance some new matter, not found in the bill, as a bar ; yet this

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does not apply to what is called a negative plea,—as where the plaintiff claimed only as administrator, and the defendant pleaded that he was not administrator, the plea was allowed; and yet it is obvious, that it advanced no new matters, but rested the defence upon a simple denial of one of the component parts of the plaintiff's title, as set forth in his bill. 2 *Ch. Cas.* 10. 3 *Ch. Rep.* 71. 1 *P. Will.* 767. 1 *Vern.* 473. *Dick.* 510. 1 *Cox.* 198. 11 *Ves.* 302.

Every bill assumes two positions: *first*, that the court has jurisdiction of the case; and *secondly*, that the plaintiff has the capacity to sue, as stated in the bill; and therefore, a plea to the jurisdiction, or in disability of the person which denies one of those positions, amounts to no more than the denial of the title to relief from that court, or to that person, admitting all other facts to be true as stated. But there are pleas in disability of the person, such as infancy, coverture, or insolvency, which do not rest exclusively upon the statements of the bill; and yet it is said, in the rules digested by the chancellor of the Republic of *England*, which were afterwards literally adopted, that a plea in disability of the person, or to the jurisdiction of the court, should be received and filed. *Beam. Ord.* 172, 488. Whence it would seem to have been laid down as a general rule, that such pleas need not be put in on oath; because, if in any case where a plea is required to be sworn to, it is not put in on oath, it will be considered as a nullity, and ordered to be taken off the file. *Pra. Reg.* 274. 2 *Ves. and Bea.* 357. It is a general rule in equity, as well as at law, that a defendant cannot have the benefit of the statute of limitations, unless he in some way particularly asks for it. At law, where it appears by the declaration, that the case is within the statute, the defendant cannot have the benefit of it by demurrer; he can only take advantage of it in such case by plea, 2 *Saund.* 63, note 6; and in equity it is almost always taken advantage of by plea, or by being specially relied on in the answer; indeed it was at one time doubted, whether the benefit of it could be had in any

other way ; because it was said, the plaintiff should not, by a demurrer, be precluded from bringing his case within some of the savings, or exceptions of the statute, either by amending his bill, or by putting in a special replication. 3 *Atk.* 226. But where a mortgagor comes to redeem, it is the law, or rule of the Court of Equity, that he must show a good title to redemption, within twenty years, or he cannot be relieved ; and therefore, if it appears upon the face of the bill, that he has not brought his case within that rule, or that he has stated no fact or circumstance, which can take his case out of the operation of the statute, the defendant may demur, and rely on the statute of limitations as a cause of demurrer. 3 *Bro. C. C.* 635. 2 *Sch. and Lef.* 638. 19 *Ves.* 115. 1 *Ves. and Bea.* 536. From this review of the subject, it appears, that when the oath of the defendant, as in the case of a plea which relies exclusively upon a matter of record, can add nothing to the verity of the fact set out in the plea, or as in the case of a demurrer, or a plea to the jurisdiction, when the facts relied on by the plea, are only those set forth by the plaintiff himself in his bill, there the plea need not be put in on oath,—Whence it is clear, that where the lapse of time appears upon the face of the bill, as in this instance, without any allegation of an acknowledgement, payment, or other circumstance which can take the case out of the statute, the defendant may take advantage of the statute, either by a plea, or by a demurrer ; and such plea or demurrer need not be sworn to, because the oath of the defendant cannot be required by the plaintiff, to verify facts, which he himself has stated to be true.

Where three or more are bound by a joint and several bond, a suit may be brought on it, either against *all*, or any *one* of the obligors ; but not against any intermediate number of them. But this bill is filed against the representatives of only two of the obligors, without in any manner accounting for, not having made the other a party. *Yelv.* 26. *Hard.* 198. 1 *Hen. and Munf.* 61. It is a general rule in

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equity, than when a debt is joint and several, the creditor should bring all his debtors before the court. The exceptions to this rule are, first, when the party omitted, is only a surety ; but here, *Thomas S. Lee*, is stated to be the principal debtor ; secondly, where nothing has been paid, and the co-obligor is insolvent ; but here, there is nothing said about the insolvency of *Lee* ; thirdly, where the co-obligor is dead, and there are no personal assets ; but here it is not said that *Lee* is dead without leaving assets ; and lastly, where a judgment has been obtained against one of the obligors, who alone is sued, because the judgment drowns the bond, and makes him alone liable ; but this bill is against the representatives of the one security, resting on their liability on the bond alone ; and against the representatives of the other surety, resting on their liability on the judgment obtained upon the bond. Considering this as a case against sureties alone, whose principal was insolvent, and who were, from the nature of their liability, entitled to contribution from each other, the bill may be well founded ; and the joint and several plea of *Marshall Waring*, and *Notley Young, of Ben.*, and *Eleanor Clagett*, who, although chargeable, the one on the judgment, and the other two on the bond alone, may yet, in respect of their being sureties, and entitled to contribution in payment of the same debt, be permitted thus to join in a defence against the same claim. But in equity these defendants ought not, from the plaintiff's own showing, to be made to pay any thing, much less to be put to call for contribution from each other, if their principal be solvent ; for although the court must by a general decree, bind them all alike in favor of the plaintiff, yet it ought to decree over, in favor of the sureties against the principal ; which cannot be done in this case, because he is not here as a party. 2 *Vern.* 195, (note.) 3 *East.* 258. 2 *Atk.* 436. 3 *Atk.* 406. *Dick.* 738. 16 *Ves.* 306. 1 *McCord*, 301. 5 *Cran.* 330. 2 *Harr. and Gill*, 309. Upon the whole then, I am of opinion, that the bill has not made, or sufficiently accounted for not having made one a party to this

suit, who is represented as the principal debtor ; and the case must therefore stand over with leave to amend in that respect. I am also of opinion, that all these pleas must be deemed sufficient as the case now stands.

According to the *English* course of proceeding, which has been, and unless repealed, is now the rule of this court, either party may set down a plea to be argued ; and if it be allowed, the plaintiff pays five pounds ; but if it be overruled, or ordered to stand for an answer, with liberty to except, without a saving as to the payment of costs, the defendant pays five pounds. *For. Rom.* 54. The object of this regulation seems to be, to make the unsuccessful party pay for the costs, and trouble of the argument thus called for, in order to ascertain the sufficiency of the plea ; and it is perfectly reasonable, that the peril of incurring such costs and expense should be entirely reciprocal. But our act of 1785, *ch.* 72, *sec.* 25, only declares, “that the party whose demurrer or plea is so *overruled* upon argument, or withdrawn, shall pay to the opposite party, the sum of five pounds current money, and the costs thereof.” There is nothing in this provision, which negatives the ancient reciprocal rule of the court ; and therefore, considering the old rule as still in force, and as founded on reason and justice, I shall apply it accordingly.

Whereupon it is on this 28th of January, 1831, adjudged and ordered, that the pleas of the defendants be, and the same are hereby deemed sufficient ; and the said plaintiff is required to admit, or reply to the same. And it is further ordered, that the said plaintiff pay to each of the said defendants, the sum of five pounds, current money, and the costs of the said plea to be taxed by the register, and be in contempt until the said sum of money and costs be fully discharged and paid. And it is further ordered, that this case stand over, with leave so to amend, as to make *Thomas S. Lee*, or his representatives, parties, or to show why they ought not to be made

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parties to this suit; or to amend in any other manner, which the nature of the case may require.

From this order, the complainant appealed to the Court of Appeals.

The cause was argued before EARLE, MARTIN, and STEPHEN, J.

Speed, for the appellant, contended,

1. That the pleas of the act of limitations should have been sworn to. *Coop. Eq.* 251, 252. 2. That they should have been accompanied by answers, showing that none of the payments of interest alleged by the bill to have been made, were made within twelve years. 2 *Ves. and Bea.* 354. 1 *Mad. Rep.* 204. 5 *Ib.* 204. *Eq. Draft.* 443. 3. The chancellor erred in deciding the question of parties, when the only matter submitted to him, was the sufficiency or insufficiency of the pleas. 4. The old rule making the fine reciprocal in cases of this description, is repealed by the act of 1785, *ch. 72, sec. 25*, according to which the complainant is not liable to it.

Flusser, for the appellees.

1. When the plea relies entirely upon the case made by the bill, and introduces no new matter in avoidance, it is good, though not sworn to, or supported by an answer. *Coop. Eq.* 231, 232. 1 *Newl. Pr.* 116. 2 *Mad. Ch. Pr.* 308, 310, 311. *Boehm's Pr.* 323, 334, &c. *Mitf. Pr.* 208. 4 *Harr. and Johns.* 539. 1 *Madd. P.* 25. 2. There is no fact contained in this bill, which made it necessary to swear to the plea, or to accompany it with an answer. The case made by the complainant, is subject to the bar of the statute, and there is nothing for an answer to deny. *Coop. Eq.* 227, 313. 3 *Johns. C. C.* 384. 4 *Harr. and Johns.* 126. 1 *Gill and Johns.* 272. *Mitf.* 40. 3. That part of the chancellor's order, which relates to parties, decides no matter of right, and is not the subject of an appeal. 4. Upon this point, he referred to 1 *Newland*, 121.

STEPHEN, Ch. J., delivered the opinion of the court.

Although it appears to be the practice of the Court of Chancery in *England*, in the case of a plea, ruled to be sufficient, when set down for argument, to make the complainant pay five pounds costs, 1 *Newl. Ch. Pr.* 121, we do not consider that such a principle of practice can be sanctioned in this State, since the act of 1785, *ch. 72, sec. 25*, which contains in our opinion, a strong and irresistible implication, that a fine should be paid only by the party pleading, or demurring, whose plea or demurrer should be overruled. This express legislative provision, imposing a fine upon the party pleading or demurring, we consider a rejection of the *English* practice, which imposes a fine upon the complainant, where the defendant's plea is allowed, or ruled sufficient; as it cannot readily be perceived, why the imposition of the fine, was confined by that law, to the *party pleading or demurring*, if it was intended that such principle of practice should be extended to the *opposite party* likewise. Upon the subject of the legal sufficiency of the pleas filed in this case, we concur in opinion with the chancellor. We do not think that it was necessary, that the pleas should have been verified by an oath. Whether there had been a sufficient lapse of time, to make the bar created by the act of limitations a defence to the complainant's suit, fully and explicitly appeared upon the face of his bill. There was therefore no conceivable reason for requiring that the plea should be supported by such a sanction. Equally unnecessary was it, that it should have been supported by an answer; because there was nothing charged in the bill, in avoidance of, or which could take the case out of, the operation of the act of limitations. The payment of interest, if it had been precisely, or definitely alleged in point of time, it is clear, both upon reason, and authority, would not have had that effect; because the language of the statute of this State, in the case of a bond, is positive and peremptory, that no bond shall be good and pleadable, or admitted in evidence, after the principal

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debtor and creditor have been both dead twelve years, or the debt, or the thing in action, above twelve years standing, saving to the creditor the usual benefits, or exceptions of infancy, &c. It is also incontrovertibly established, that not even an express acknowledgment of the debt, will revive the remedy upon the bond, when barred by the operation of the act.

The decree of the chancellor is therefore reversed, and the case sent back for further proceedings, agreeably to the principles herein contained.

DECREE REVERSED.

DANIEL CARROLL of Duddington, vs. LEE, adm'r of LEE.
June, 1832.

A separate estate in a wife, in personal chattels, was unknown to the common law; like her person, her property was under the control of her husband.

A separate property may now be held by a married woman, through the intervention of a trust, and even without the interposing office of a trustee.

To exclude the marital rights over her property, a clear intention in the donor, that it shall be for her separate use, must appear. No technical words are necessary, but adequate language must be employed in making a gift, to manifest a decided intention to transfer a separate interest.

A gift of plate to a married woman, unexplained as to intention, is a gift, to which the marital rights instantly attach, and the thing given, immediately becomes the property of the husband.

When property in controversy is within the limits of the State, and the claimant resides abroad, the Chancery Court has an undeniable jurisdiction over the case.

So, where the defendant is within the State, and the land, or other property in contest, is beyond its limits, although the proceeding is in *rem*, the Court of Chancery has jurisdiction. To enforce a decree in such a case, the proceeding may be in *personam*, as well as by injunction, to recover the possession of the thing disputed.

Where the property has been removed from the State, and the defendant resided out of its limits, his appearance to the suit, and answer to the bill, for the purpose of contesting the merits, is waiver to any objection to the jurisdiction of the court, although in his answer he also excepts to it.

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APPEAL from the Court of Chancery.

The present bill was filed by the appellee, *Wm. Lee*, as administrator of *Mary Lee*, on the 1st November, 1827, against the appellant, and one *Daniel C. Sim*. The bill stated, that a certain *Ignatius Digges*, of *Prince George's* county, in the state of *Maryland*, being possessed of a large quantity of silver plate, by his last will and testament, dated in 1784, (a copy of which is exhibited with the bill,) bequeathed the same to his wife, *Mary Digges*, for life, remainder to his grand-son, *Ignatius Digges Lee*; but in case he should die before he attained the age of twenty-one, or unmarried, then to *Mary Lee*, the intestate of complainant, and her heirs; that *Mary Digges*, the wife of the testator, and the executrix named in his will, took out letters testamentary, and assumed the burden of the execution thereof; that *Ignatius Digges Lee*, died before he attained the age of twenty-one years, and unmarried, after which *Mary Digges* delivered to the intestate of complainant, sundry pieces of the plate, thereby recognising the authority of *Ignatius Digges* to dispose of it; that *Mary Digges* has since departed this life, having made and duly executed her will, of which *Daniel C. Sim* is the executor, and bequeathing to *Daniel Carroll*, (the appellant,) of the *District of Columbia*, a considerable portion of the aforesaid plate, (which the bill enumerates,) and which her executor accordingly handed over to *Carroll*, the legatee, who is now in possession of the same, claiming title thereto, under the will of the said *Mary Digges*.—PRAYER, That said *Carroll*, and *Sim*, the executor, may be decreed to deliver complainant the pieces of plate aforesaid, of which they may respectively be in possession, or pay the value thereof, and for general relief; and an order for publication is prayed against *Carroll*.

Carroll, in his answer, says, that he resides out of the State of *Maryland*, and that the whole subject matter of the suit, was, at the time of filing the bill, and now is, beyond the limits of this State, as the complainant in his bill charges; he therefore objects, and pleads to the jurisdiction of

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the court, in the premises. The answer then admits, that *Ignatius Digges* died as stated, having by his will, of which his wife, *Mary Digges* was executrix, bequeathed the plate, as the bill charges; that *Ignatius Digges Lee*, died under twenty-one years of age, and unmarried, and that complainant is the administrator of *Mary Lee*; that he the defendant holds the plate under the will of *Mary Digges*, who died in 1825, to whom it properly belonged; that it was in no wise subject to the will of her husband, *Ignatius*, even though she might have been in possession of it during his life-time, as in that event, it constituted a portion of her *paraphernalia*, over which her husband could exercise no control, by any attempted testamentary disposition. The jurisdiction of the court was also objected to, upon the ground, that the subject matter of the controversy is cognisable in a court of common law. The answer denies that *Mary Digges* delivered any portion of said plate to *Mary Lee*, in pursuance of the provisions of her husband's will, or that she ever, in any way, acquiesced in the power assumed by him in his will, to dispose of the same, if his will does in fact assume such power. It also denies, that the limitations in the will are valid and effectual, in reference to such property, to vest the title in *Mary Lee*, although the intention of the testator may have been such as the complainant assumes it to have been, on the contrary, the answer insists that *Mary Digges*, the first taker, took an absolute and indefeasible estate therein.

The answer of *Sim*, the executor of *Mary Digges*, admits the execution of the wills, and the deaths of the several parties, as stated: that he had delivered a portion of the plate, as the bill charges, to *Carroll*, the other defendant, in compliance with the will of his testatrix, in which he insists he was justifiable, as the same was given to his testatrix by her brother, after her intermarriage with *Ignatius Digges*, and was always, during her life, considered by her, as her sole and separate property.

It was proved, under a commission, that the plate in question was given to *Mary Digges* by a brother, during her *coverture*.

BLAND, chancellor, at December Term, 1830, decreed, that the defendants, *Daniel C. Sim*, and *Daniel Carroll, of Duddington*, forthwith transfer and deliver over to the plaintiff, the several pieces of silver plate, in the proceedings mentioned, which have been hitherto held and detained by the said defendants, and that they pay the plaintiff his costs.

From this decree the defendant, *Carroll*, appealed to this court.

The cause came on to be argued at June Term, 1832, before EARLE, MARTIN, and STEPHEN, J.

Speed, for the appellant, contended,

1. That the complainant had a legal remedy. 2. That the plate being the *paraphernalia* of the wife, the husband could not dispose of it by will, though by the same will, a benefit might be conferred upon, and enjoyed by her. *Brinkman vs. Brinkman*, 3 *Atk.* 358, 394. 2 *Ib.* 79. 2. He argued, that a present to a wife, by a stranger, during *coverture*, is a gift to her separate use, and the husband has no control over it. 3 *Atk.* 93. 3. *Carroll*, the defendant, and the subject of the suit, being both beyond the limits of the State, the court has no jurisdiction.

No counsel argued for the appellee.

EARLE, J., delivered the opinion of the court.

The pieces of plate which form the subject of dispute between the parties in this case, are claimed by the appellee, under the will of *Ignatius Digges*, and by the appellant, *Daniel Carroll, of Duddington*, under the will of *Mary Digges*, the surviving wife of *Ignatius Digges*. What were the respective rights of these testators, while living,

to this property, presents the inquiry at this time first to engage the attention of the Court of Appeals. All the testimony in the cause, was taken on the part of the appellee. From this it appears, that the disputed plate was given to *Mary Digges*, by one of her brothers, after her marriage with *Ignatius Digges*; and the question we have to decide, is, whether by the gift it became her sole and separate property, or devolved on her husband, and made a part of his personal estate. A separate interest in a wife in personal chattels, was unknown to the common law. Like her person, her property was under the control of her husband. This strictness has been much relaxed by the decisions of the courts of equity. It is now fully established, that a separate property may be held by a married woman, through the intervention of a trust, and even without the interposing office of a trustee. To exclude, however, the marital rights over her property, a *clear* intention in the donor, that it shall be for her separate use, must appear. No technical words are necessary to create a separate use, but adequate language must be employed, in making the gift, to manifest a decided intention to transfer a separate interest; to shew that the husband was not to enjoy what the law would otherwise give him.

Is this the character of the gift we have now to review? It was made, it is presumed, by parol, and many years have elapsed since it was made. What the declared intention of the giver was, if his intention was expressed, is lost in time, and must forever remain a secret to us. All we know is, it was a present of plate from a brother, to a married sister. Can we, from this circumstance of relationship, and from the nature of the subject given, infer an intention in him, to give it to her, for her separate property? This is the particular point that awaits our decision, and it does not seem to us, that we need be slow in giving it. It is plain, this naked gift does not justify an inference, that it was her brother's decided intention to give to *Mary Digges* this plate, for her sole, separate use. We are aware of the case

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of *Brinkman vs. Brinkman*, adverted to in 3 *Atk.* 392, where such a gift of plate, from the father of the husband to the wife, immediately on her marriage, was construed to pass the property to her separate use; but we do not feel disposed to yield to it, as an authority. It is a case not regularly reported, and in our apprehension, the subject matter of the gift does not justify the inference, that it was designed for the separate use of the wife. We consider plate as an article of family use, and one that makes as much a part of the household, as any that belongs to it. It is then our opinion, that a gift of plate to a married woman, unexplained as to intention, is a gift to which the marital rights instantly attach, and that the thing given immediately becomes the property of the husband.

There is a further question in this case, that requires a moment of our attention. It arises out of the plea put in by the appellant, to the jurisdiction of the court. The plea states the facts, which are conceded by the pleadings, that at the time of filing the bill, the appellant resided in the *District of Columbia*, where he had in his possession the plate sought to be recovered. Ought the chancellor to have disregarded the plea, and decreed, as he did, the delivery of the plate, is then the point of inquiry? Where property in controversy is within the limits of the State, and the claimant resides abroad, the Chancery Court has an undeniable jurisdiction over the case. 1 *Atk.* 19. 2 *McCord, Ch.* 437. So where the party defendant is within the State, and the land, or other property in contest, is beyond its limits, although the proceeding is in *rem*, we apprehend there is no want of jurisdiction in the chancellor. To enforce a decree in a case of this kind, the proceedings may be in *personam*, as well as by injunction, to recover the possession of the thing disputed. This is the case of *Penn vs. Lord Baltimore*, 1 *Ves. sen.* 454, where *Lord Hardwicke* held, that the property in dispute being in the *Plantations*, was no legal impediment to making the decree, the parties to the suit being in *England*.

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The subject before us, however, is supposed to afford a stronger case, inasmuch as both the party and property were without the limits of *Maryland*, at the institution of the suit, of which the defendant was notified by an order of publication. There might be something, perhaps, in this concurrence of facts, if the property had not been removed out of the State, and the appellant had not appeared and answered the bill, as well as except to the jurisdiction. This he did, and contested the question of merits before the chancellor, whether the complainant had a right to recover; and if the decree had been in his favor, would assuredly have forced his adversary into the Court of Appeals, or forever barred him from a further suit for the same property. To say nothing of the effect of the answer upon the plea, this, we conceive, is a waiver of it, and a submission to the jurisdiction, and brings the subject as much within the power of the court, as in the case of *Penn vs. Lord Baltimore*, where the party resided within the chancery jurisdiction.

DECREE AFFIRMED.

STEWART, Trustee of STONE, *vs.* STONE, *et ux.* AND
WHITE.—*June*, 1832.

It is an established principle of evidence, that the answer of one defendant cannot be received in evidence against a co-defendant. If the complainant wishes to establish a fact, by the evidence of a co-defendant, he may be examined as a witness on interrogatories, which will afford the other defendant an opportunity to cross examine him.

In a suit in Chancery, by the permanent trustee of an insolvent debtor, it is necessary to show, that the complainant gave bond with surety in that character before filing his bill, and although the allegation in the bill, to that effect, was admitted in an answer by one defendant, yet as respects another defendant, whose answer was silent in relation to that fact, proof of the bond with surety was held requisite.

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Where the Court of Appeals is of opinion that a bill dismissed generally by the chancellor, should have been dismissed without prejudice, the practice is to reverse the decree of the chancellor, and pass a new decree.

APPEAL from the Court of Chancery.

On the 24th January, 1829, a bill was filed by the appellant, *David Stewart*, as permanent trustee of *Samuel Stone*, against the appellees, *Samuel Stone* and *Barbara his wife*, and *Jacob White*.

The bill stated, that *Stone* became indebted to one *Chas. Salmon*, in the year 1826, for goods, &c. sold him by *Salmon*, to the amount of \$490 53, for which he gave his promissory note, payable in six months, from the 3d May, in the year aforesaid. That said note not being paid at maturity, suit was instituted upon it, and judgment obtained in September, 1828. That a *ca. sa.* issued thereon, which was served on the defendant, on the 3d January, 1829, and on the 6th of the same month, the said defendant applied for, and obtained a personal discharge, under the insolvent laws of the State. That on the 14th of the same month, complainant was duly appointed his permanent trustee, and gave his bond as such, which was duly approved by the Commissioners of Insolvent Debtors for the city and county of *Baltimore*. That the insolvent returned no property on his schedule, at the time of his application. The bill then charges, that at the time *Stone* became indebted to *Salmon*, as aforesaid, he (*Stone*) was in possession of a considerable estate, both real and personal, and evidences of debt amounting in the whole, to not less than \$3000. That for the purpose of defrauding his creditors, he, on the 27th August, 1828, united with his wife, in a conveyance of the whole of the said estate to *Jacob White*, in trust for his said wife, as will appear by reference to the conveyance, a copy of which the complainant exhibits with his bill. And he charges, that said conveyance was made by *Stone*, under an expectation of becoming an insolvent debtor, and for the purpose of giving an undue and improper preference to

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the wife, and is therefore absolutely null and void, and the property meant to be conveyed, is vested in complainant as trustee of the insolvent. The bill then prays, that said deed may be declared void, and the property be delivered to complainant, for the benefit of the insolvent's creditors, and for general relief.

The answer of *Barbara Stone*, admitted that she had been informed of certain dealings, and mercantile transactions, between her husband, *Samuel Stone* and *Charles Salmon*, though she had no personal knowledge on the subject. She also admitted that she had been informed, "that the said *Samuel Stone* hath made application for the benefit of the insolvent laws of Maryland, and that the complainant hath been appointed his permanent trustee for the benefit of his creditors." The answer then goes on, to deny the fraud charged by the bill, and asserts, that the deed which it seeks to vacate, was made in pursuance of an antenuptial contract, (exhibited with the answer) entered into between her and her present husband, *Stone*, on the 2d February, 1826, five days before their intermarriage.

The answer of *Samuel Stone* the insolvent, admits, that in the spring of 1826, and subsequent to his intermarriage with *Barbara*, he became indebted to *Charles Salmon*, in the manner, and to the amount stated in the bill, for which he gave his note as charged. That suit was instituted thereupon, judgment recovered, this respondent arrested, that he petitioned for, and obtained the benefit of the insolvent laws, as likewise alleged; that complainant was appointed his permanent trustee, and gave bond as such trustee, which has been approved by the Commissioners of Insolvent Debtors for the city and county of *Baltimore*. After denying the fraud, this answer also sets up the *ante-nuptial* contract, relied on, and exhibited with the answer of *Barbara Stone*, and alleges, that the deed sought to be annulled, was made in pursuance thereof, and not for the purpose of defrauding his creditors.

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The answer of *Jacob White*, the other defendant, is not material ; and the proof taken under a commission related merely to conversations with the insolvent, before and after he petitioned, in reference to the claim of another creditor. There was no proof that complainant had given a bond with security, as trustee.

BLAND, chancellor, (at March Term, 1831,) dismissed the bill with costs.

From this decree the complainant appealed to this court.

The cause was argued before MARTIN, STEPHN, and DORSEY, J.

Boyle, and *Gill*, for the appellant, referred to the act of 1805, *ch.* 110, *sec.* 9. 1807, *ch.* 53. 1812, *ch.* 77, *sec.* 1. 1816, *ch.* 221.

Scott, for the appellee, cited, *Winchester vs. The Union Bank of Maryland*, 2 *Gill and Johns.* 73.

MARTIN, J., delivered the opinion of the court.

We think the chancellor was correct in dismissing the bill in this case. In forming this opinion, this court have not taken into consideration, what is deemed the merits of the case, the deed, the ante-nuptial contract, the fraud, and the undue preference, &c. We think that the complainant has not shewed himself entitled, to bring those questions before the chancellor. He has alleged in the bill, that he is the permanent trustee of *Samuel Stone*, and as such, has given the bond required by law. To clothe him with the authority he claims in his representative character, this allegation ought to have been admitted by the defendants, or established by other evidence. The record contains no other evidence upon this subject. The answer of *Samuel Stone* admits that complainant was appointed his permanent trustee, and gave bond as such trustee, &c.; but this answer

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cannot be used against *Barbara Stone*, the party interested in the deed. It is an established principle of evidence, that the answer of one defendant cannot be received in evidence against a co-defendant. If the complainant wishes to establish a fact by the evidence of a co-defendant, he may be examined as a witness on interrogatories, which will afford the defendant an opportunity to cross-examine him. *Barbara Stone*, in her answer, says, she has been informed, that *Samuel Stone* hath made application for the benefit of the insolvent laws of *Maryland*, and that the complainant hath been appointed his permanent trustee, for the benefit of his creditors. If this is deemed an admission that the complainant was permanent trustee, yet she is entirely silent as to *the bond*. There is then, no legal testimony in this record, to shew that complainant ever did give a *bond, with security*, as required of him by law, as the permanent trustee of *Samuel Stone*: that this was necessary, before he went into chancery, see the case of *Winchester, trustee of Williams vs. The Union Bank of Maryland, 2 Gill and Johns. 73*, where the court say, the different insolvent laws of the State constitute one general system, and must be construed together; and so construed, require a *bond, with security*, to be given before a trustee can act as such; without which, he cannot be invested with the character and rights of a trustee.

Under this view of the case, we think the bill ought to have been dismissed, *but without prejudice, &c.* The complainant ought not to be precluded, if he has equity, from again presenting himself before the court; and to afford him that opportunity, we think it necessary to reverse the decree, but without costs, and to pass a new decree to dismiss the bill, *without prejudice, &c.*

DECREE REVERSED.

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ABANDONMENT.

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ACTION OF ACCOUNT.

1. An action of account is the only action that can be brought against a guardian, *qua* guardian, in a court of law, other than an action on his bond. *Green vs. Johnson*, - 389
2. Limitations apply to this action, *Ib*.

ACTION—RIGHT OF.

1. Where two are bound for the payment of a specific sum, and one pays the whole, he can either at law or equity, call upon the other to contribute, and thus recover a moiety of what he has paid. *Owens vs. Collinson*, - - - - 25
2. An action may be maintained by a creditor of a testator, against the executor of his executor, suggesting a *devastavit* by the first executor of the goods of his testator. *Sibley vs. Williams*, - - - - 52
3. No action at Law, will lie to enforce a decree in Chancery, within the territorial jurisdiction of the Court of Chancery. That court enforces its own decrees. *Richardson vs. Jones*, - - - - 163
4. The courts will not lend themselves to a donee or assignee, to enforce an inchoate contract, not founded upon a valuable consideration; neither will they lend their aid to a donor or assignor, in a case where the gift or assignment has been consummated by possession, to recover back what the donee or assignee

has received or collected. *McNulty vs. Cooper*, - - - - 214

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ACTS OF ASSEMBLY.

1. The act of 1821, ch. 232, was not designed to prevent the mere sale of lottery tickets, or to impose upon the seller the necessity of obtaining a license therefor. Its prohibitions only extend to the opening, setting up, exercising, or keeping any office or other place, for selling lottery tickets, or registering the numbers, or publishing the setting up, &c. without having first obtained a license for that purpose. *Yates and McIntire vs. O'Neal and Smith*, - - - - 253
 2. A contract between A and B, by which the latter agreed to become the agent of the former, for the sale of lottery tickets, account for, and remit a certain part of the sales of tickets, return unsold tickets, and bear the expenses of the agency, is not void under the act of 1821. There is nothing in such a contract, upon any principle of construction applicable to penal statutes, that could warrant a jury in inferring that the agent had agreed to open an office, &c. of the character described in the act; and the court will not presume that A intended to violate that law, by having an office kept without a license. - - - - *Ib*.
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ADVANCEMENT.

1. In an action by S, a distributee of W, against L, his administrator, upon the administration bond, to recover a distributive share of W's estate, it appeared, that W, on the 22d October, 1810, conveyed sundry tracts of land and negroes to F, in consideration of \$1000, paid by F; and that F, by a deed dated a few days after, and reciting the previous deed, and declaring that it was in trust, conveyed the same property to R, in trust for W for life, then in trust for the wife of W, if she should survive him, for life, or during her widowhood, then in trust for E, A, M, S, and T, daughters of W, as to one moiety of the land for life, and as to the other moiety for B, son of W, and upon the death or marriage of the daughters, then to B, in fee. The negroes were also distributed among the same parties. L, the administrator, was another son. The trust estate was not brought into *hotch-pot*. HELD, that these deeds were to be considered as one instrument, and afford ample proof, that S was advanced by the intestate in his life-time. No valuable consideration moved from

S, and as respects her, the deeds were voluntary and gratuitous; but that this was no bar at law, to this action. *State use of Wilson vs. Jameson*, - - - - - 442

2. It is not every child that is advanced, the law excludes from distribution. It is only such as are advanced by a portion, equal or superior to a share. To make a full defence at law, under the act of 1798, ch. 101, sub-ch. 11, sec. 6, the defendant must show to the jury, the value of the plaintiff's advanced portion, and that it was equal to his distributive share. - - - - - *Ib.*

ALLEGATA ET PROBATA.

It is not upon the evidence, but upon the pleadings, and evidence applicable to the pleadings, that a plaintiff can recover in any case. *Turner vs. Walker*, - - - - - 377

ANNUITY.

W, by his last will devised as follows: "I give and bequeath to my daughter A, the sum of \$60, as an annuity, to be paid to her out of the profits of my real estate annually." This is an annuity, and not a rent charge. *Robinson vs. Townshend*, 413

APPEAL.

1. An appeal from a decree of the chancellor cannot properly be taken, after the death of the only complainant in the cause, in the name of such complainant; and neither the appearance of the representatives of the deceased party, after a suggestion of the death in the appellate court, nor the appearance of the other party there, cures the defect. The court on motion dismissed such an appeal. *Owings vs. Owings*, - - - - 1
2. The Act of 1785, ch. 80, sec. 1, (to prevent the abatement of actions) does not apply to causes in the appellate court, - - - *Ib.*
3. The Acts of 1806, ch. 90, sec. 11, and 1815, ch. 149, sec. 5, 6, relate to causes in the Court of Appeals, but neither of them relates to an appeal prayed from Chancery in the name of a deceased person, - - - - - *Ib.*
4. The law having fixed a *minimum* and a *maximum* rate of commission to be allowed to executors or

- administrators, and vested a discretion in the Orphans Court, restricted only by those limits, an allowance by that court, of commissions within those rates, is not to be reviewed here. This court has no power to disturb such a decision. *Wilson vs. Wilson*, - - 20
5. A judgment of the County Court upon an issue joined on a plea of *nul tiel record*, cannot be reviewed in the Appellate Court, when the appellant did not except to that judgment, and incorporate the record which was submitted to the court in a bill of exceptions, nor put any matter upon the record to shew why such judgment should not be rendered. *Ayres vs. Kean*, 24
6. The objection to the competency of a witness, by whose proof, a mere interlocutory order, not the subject of an appeal, was obtained, is open to consideration in the Appellate Court, though more than nine months had elapsed, between the passage of the interlocutory order, and the time of taking the appeal from the final decree. *Hungerford vs. Bourne*, - - - 133
7. An order requiring the principal obligor, and the sureties in a bond, given for the purchase money of land sold by a trustee of the Court of Chancery, to pay such purchase money to the trustee, or bring it into court, or show cause to the contrary by a given day, is purely interlocutory, settles nothing between the parties, and is not the subject of an appeal. *Richardson vs. Jones*, - - - - - 163
8. A prayer by the defendant addressed to the court, requesting them to instruct the jury, that "the plaintiff upon the evidence, is not entitled to recover upon either count in the declaration," is, since the act of 1825, ch. 117, too general in its terms, and the refusal to grant it, is not the subject of an appeal. *Penn vs. Flack and Cooley*, 369
9. Upon a bill to record a mortgage against subsequent purchasers charged with notice, the chancellor, when the case stood ready for hearing, said in his remarks preparatory to the order appealed from, "I am satisfied that the defendants must be considered as purchasers with full notice of the vendor's (the complainant's) lien, and of the mortgage which had been given to secure the payment of the purchase money, and that under the one or the other the land was bound," but passed no order directing the mortgage to be recorded. The order passed in the cause, only referred the case to the auditor, with the usual directions to receive further proof, and state an account. *Held*, that nothing had been done conclusive upon either the chancellor or the parties—no question of right had been settled, and that an appeal would not lie at that stage of the cause. *Roberts vs. Salisbury*, 425
10. Where a party at the trial of a cause makes a general prayer to the court, which is refused, and the court then proceed of their own accord, to give a specific instruction to the jury, which was excepted to, this court upon appeal will review such instruction, although since the act of 1825 it would not have regarded the general prayer. *Sothoron vs. Weems*, - - 435
11. Under the act of 1825, ch. 117, the appellate court considers what particular point, or question the County Court has decided, and determines accordingly, whether it is correct or erroneous, and not whether the reasons assigned by the counsel on the record justifies what has been done. - - - - - *Ib.*
12. So where the admissibility of the testimony adduced, being objected to, whether it was admissible or not for the reason assigned, is wholly immaterial; this court regards as the point decided below, the competency or incompetency of the evidence. - - - - - *Ib.*
13. To justify the reversal of a court's judgment, on the ground of their having given an erroneous instruction to the jury, it must appear that the appellant actually, or probably, did sustain an injury thereby. If it did him no prejudice, no matter how erroneous, it forms no ground of reversal. *Bosley vs. Chesapeake Insurance Company*, - - - 450
14. Where the Court of Appeals is of opinion that the bill dismissed generally by the chancellor, should have been dismissed without prejudice, the practice is to reverse the decree of the chancellor, and pass

a new decree. *Stewart vs. Stone*, 509

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ASSIGNMENT.

The blank endorsement and delivery of a bond, invests the holder with the right of collecting and suing for, in the name of the assignor the money due upon such bond, and of appropriating the same to his own use. *McNulty vs. Cooper*, - - - - - 214

ASSUMPSIT.

See Lex Loci, 2.

ATTACHMENT TO COMPEL APPEARANCE.

See Practice, 8, 9, 10, 11.

AUDIT.

See Practice, 14.

BAIL.

It has long been the established practice of our courts, upon the production of a release of the principal under the Insolvent Laws of another State, by the special bail, to enter an *exoneretur* of the bail.

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See Evidence, 3.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The endorsee of the payee of a negotiable note, can maintain an action for money had and received, against the maker of the note, upon the proof of the note and endorsement. *Penn vs. Flack and Cooley*, 369.

2. The promissory note of I, endorsed by G and P, fell due at *Washington*, on the 6th, where payment was then demanded, and refused. The notices to the endorsers were enclosed in a letter addressed to P, at *Baltimore*, and mailed at *Washington* on the evening of the 6th. The mail left *Washington* every morning, and arrived at *Baltimore* at an early hour the same afternoon. Both the endorsers lived in *Baltimore*, and no notice was delivered to G, the first en-

dorser, on the 9th. **HELD**, that G was discharged from his liability as endorser, the notice being one day too late; in legal presumption the notice reached P on the 7th. *Flack vs. Green*, - - - - - 474

3 After evidence had been given, that a letter containing two notices for endorsers upon a dishonored note, had been mailed under cover to one of them, at W, directed to B, where they both resided, it was proposed to prove, that it was the invariable and uniform practice of the endorser's house and counting room, to which the notices had been directed, to forward such notices immediately upon the receipt of them, and the witnesses who were employed in such counting room, had no doubt, and believed, from the course of their business, that they had forwarded one of the notices to the other endorser. **HELD**, that the proposed evidence was incompetent, to prove the delivery of a notice in due time to the other endorser. - - - - - *Ib.*

4. No person can become a party to a bill, unless his name appears on some part of it. - - - - - *Ib.*

5. One whose name is not upon a bill, though interested in it, is not entitled to the benefit of the rule, that each party is entitled to an entire day, for the purpose of giving notice to the person preceding him, on a dishonored note or bill. - - *Ib.*

See Usury, 3.

BILL OF RIGHTS.

See British Statutes, 1.

BOND.

1. From the earliest period of our judicial history, a scrawl has been considered as a seal. It is not necessary that it should be adopted by the obligor, by a declaration in the body of the bond or single bill, to make it his seal. It is sufficient, if the scrawl be affixed to the bond or bill, at the time of its execution or delivery; and that is presumed (in the absence of other proof,) from the fact that the obligee is in possession of an instrument with a scrawl attached to it. *Trasher vs. Everhart*, - - - - - 234

See Collector of Taxes, 1, 2.

— Court of Chancery, 8.

- See Estoppel, 1.
 — Evidence, 9.
 — Lex Loci, 2.
 — Limitation of Actions, 6.
 — Orphans Court, 3.
 — Pleas and Pleading, 8, 9.
 — Practice, 2, 3, 4, 5, 6, 7.

BRITISH STATUTES.

1. The statute, 39 *Chas. 2, ch. 7*, and a part of 4 and 5, *Will. and Mary, ch. 24*, are in force in this State. They concerned the administration of justice, and it has always been understood, that the judges under the old government, laid it down as a general rule, that all statutes for the administration of justice, whether made before or after the provincial charter, so far as they were applicable, should be adopted. *Sibley vs. Williams*, - 52
2. Since the statute of 5 *Geo. 2, chap. 7*, lands have not been considered as a secondary fund in the hands of the debtor for the payment of debts; but they are equally liable with his personality. The judgment creditor may, at his election, seize either, unless under peculiar circumstances of equity, he shall be restrained from exercising his election to the prejudice of an alienee, devisee, or heir. *Hanson vs. Barnes*, 359
3. After the death of a debtor, lands are only secondarily liable, but this must be taken with the qualification, that prior to his death, they had not become liable to be affected by an execution. - - - - *Ib.*
4. The lien upon lands is from the rendition of the judgment, and the right to execution of lands in the tenure of the heir, grows out of the statute 5 *Geo. 2, ch. 7*, in connexion with that lien. - - - - *Ib.*

- See Replevin, 2.
 — Evidence, 17, 18.

CAPIAS AD SATISFACIENDUM.

- See Execution, 5.

CASES OVERRULED.

The case of *Grant vs. Bell*, 4 *Harr. and McHen.* 419, overruled. *Green vs. Johnson*, - - - - - 389

CASE STATED.

Upon a case stated, the court can supply no fact by implication. *Hy-singer vs. Baltzell*, - - - - 158

CASUAL EJECTOR.

- See Ejectment, 7.

CESTUI QUE USE.

1. By the common law a *cestui que trust* has no standing in court, in *propria persona*, he can only assert his rights in a Court of Chancery. *Green vs. Johnson*, - - - 389
2. Courts of common law, to prevent fraud and injustice, will protect the rights of *cestui que trusts*; but this is done in the exercise of a *quasi* equitable jurisdiction, as where an appeal is made to the justice and discretion of the court, by way of motion, the matter whereof cannot be insisted on as a legal right, or presented in the form of a plea. - - - - - *Ib.*
 See Practice, 7.
 — Trust, 2.

CLERKS OF COURTS.

- See Collector of Taxes, 2.

COLLECTOR OF TAXES.

1. The design of the act of 1815, *ch. 173*, allowing to collectors, one year after the expiration of the time for which they are appointed, to collect balancees due them, was only to give them further time for their own benefit, to collect what they had neglected to collect in due time, in the same manner in which they might have made the collections, within the time prescribed. *Levy Court vs. Dorsey*, - - - 75
2. In an action upon a collector's bond given to secure the collection of taxes, the collector cannot place his defence on the non-delivery, by the clerk of the County Court, to him, of the rate of the assessment and list of taxable inhabitants, unless he states in his plea, that he had applied for the rate and list to the proper officer, and that he either refused or neglected to furnish them. It is the duty of the clerk to deliver the lists at his office, where all his official acts are done, and the collector should apply for them there. *The State vs. Scharff*, 95

COLLECTOR—UNDER LETTERS AD COLLIGENDUM.

- See Executors and Administrators, 1.
 — Appeal, 4.

COMMISSIONS.

See Court of Chancery, 17.

COMPOUND INTEREST.

See Court of Chancery.

CONDITION PRECEDENT AND
SUBSEQUENT.

See Court of Chancery, 16.

CONFIRMATION.

It is the office and operation of a deed of confirmation, to corroborate and give legal effect to a voidable, and not a void estate. It cannot work upon an estate void at law. *Blessing vs. House*, - - - - 291

CONSTRUCTION.

See Covenant, 1.

— Acts of Assembly, 1, 2.

— Ejectment, 1.

— Court of Chancery, 15.

— Contract.

CONTRACT.

In an action of *assumpsit* brought by W. & Co. to recover a portion of the instalments mentioned in the following agreement, dated 1st Dec. 1818, viz: "We the subscribers, promise to pay unto W. & Co. the sum we may subscribe as a payment for the steam boat S. in three equal instalments, viz. &c. It is hereby understood, that we, W. & Co. bind ourselves to appropriate the money subscribed, in no other manner, but for the payment and use of said boat, and that each subscriber will hold an interest in proportion to the shares he may take. We, W. & Co. bind ourselves to run said boat from B. to &c. and use every possible exertion in our power to the interest of the said boat. The shares will be divided into 280, of \$100 each." It appeared that 51 shares of the stock had been subscribed for, of which the defendants had taken five. **HELD**, 1. That it was not to be implied from the terms of this agreement, that W. & Co. were the owners of the steam boat. 2. That the signing of this contract was an imperfect act, of no legal obligation until the whole number of shares should be subscribed; and until that was done W. & Co. were under no obligation to per-

form their part of the agreement. 3. That W. & Co. having assigned, by way of mortgage, three-fifths of the said steam boat, after the signing of the agreement and before the bringing of the action, the consideration for the promise of paying the instalments contained in the agreement had failed, and therefore the action could not be sustained. 4. That upon the issue joined in this case, the defendant could not show that at a meeting called by W. & Co. of the subscribers thereto, it was determined by them not to pay the subscriptions, upon the ground that W. & Co had failed in their part of the engagement. *Sothoron vs. Weems*, - - - 435

See Covenant.

— Infants, 1.

CONTRIBUTION.

See Action—Right of, 1.

— Costs, 36.

CORPORATION.

See Levy Court, 2, 3.

COSTS.

The object of the act of 1825, ch. 167, throughout, is to prevent an accumulation of costs. *Blizzard vs. Jacobs*, - - - - - 66

See Practice, 12.

COURT OF CHANCERY.

1. The bar, arising from the act of limitations, relied upon in the answer of one co-defendant to a bill in Chancery, brought by a creditor against devisees, to recover his claim out of the real estate of a deceased debtor, upon the ground that the personal estate had been exhausted in the payment of debts, will not enure to the benefit of the other co-defendants, and authorise the chancellor to dismiss the bill. *McCormick vs. Gibson*, - - 12
2. Upon a bill of this description, where the devisees have received distinct parcels of property, the interests of the defendants are several and distinct. The claim against each being in proportion to the amount devised to him. - *Ib.*
3. When the accounts of an executor are under an examination in Chancery, if it should appear on the face of vouchers passed by the Orphans Court, that a claim paid,

- was not a just one against the deceased, it is as much the duty of a Court of Equity to reject it, as if the illegality of its allowance were established by proof *dehors*. *Owens vs. Collinson*, - - - 25
4. I, as executor of E, claimed an allowance for the payment of a note signed I and E, which was admitted by the Orphans Court; I passed his account accordingly, and was credited for the whole amount. This account being under investigation in Chancery, and it being admitted that the signature I and E, was in E's hand writing, in the absence of proof of partnership between them: HELD, that the *prima facie* character of the account was not impeached. - *Ib.*
5. The ground upon which Chancery interposes its aid, in the case of a clear part performance of a verbal agreement, is, that to withhold relief, would be to suffer a party, seeking to shelter himself under the statute of frauds, himself to commit a fraud. *Hamilton vs. Jones*, - - - - - 127
6. According to the principles of equitable jurisprudence, the personal estate is the natural fund for the payment of debts and legacies, and generally speaking, is first to be exhausted, before resort can be had to real property. *Hoye vs. Brewer and Troup*, - - - - - 153
6. (b) Chancery will not interpose and set aside a sale made by a trustee, to himself, or his agent, either upon the application of the trustee or the agent. *Richardson vs. Jones*, 163
7. Where a sale is made under a decree, or order in Chancery, and no bond or security is given for the payment of the purchase money, the purchaser may be compelled to complete his purchase, by an order on him in a summary way, to pay or bring the money into court. *Ib.*
8. But when a bond is given to the trustee for the purchase money, under an order of sale from Chancery, requiring a bond to be given, and the sale has been ratified, the purchaser and his sureties cannot be compelled to pay the bond in a summary way, by an order from Chancery. This constitutes a legal contract to be enforced at law. *Ib.*
9. No action at law will lie to enforce a decree in Chancery, within the territorial jurisdiction of the Court of Chancery. That court enforces its own decrees. - - - - *Ib.*
10. An order of the Court of Chancery, ratifying a trustee's sale where no bond has been given, or the sale is for cash, is considered as amounting to a decree for the payment of the purchase money, and if that court could not enforce the execution of it, it could not be enforced at all. The trustee cannot, before ratification, which is the completion of the contract, claim to enforce it in equity, nor after the ratification can he sue upon it at law. - *Ib.*
11. Where a bond has been given in conformity to the order of sale, the ratification is an adoption of the bond only. - - - - - *Ib.*
12. Where a purchaser at a trustee's sale gave his bond in conformity with the order of sale, but afterwards, by fraud, defeated the action at law brought upon his bond, he may still be made responsible in equity for the purchase money, upon a bill shewing his improper conduct, though in the mean while limitations may have barred the bond at law. - - - - - *Ib.*
13. Where the proceeds of a deceased's real estate are in the Court of Chancery, and a creditor wishes to subject that fund to the payment of his debt, upon the ground of a deficiency of assets, he is not called upon, in the first instance, to exhibit full proof of his claim: That may be done under the order *nisi* on the heirs at law. *Gaither and Warfield vs. Welsh*, - - - 259
14. S. gave his note, payable 50 days after the drawing of a lottery should be completed, "in cash, or prize tickets in said lottery," and secured the same by a mortgage. The mortgagee, two years after the drawing, assigned the mortgage. The tickets in the lottery certified that the holder thereof would "be entitled to such prize as may be drawn to its number, if demanded within 12 months after the completion of the drawing, subject to a deduction of 15 per cent. payable 60 days after conclusion." Upon a bill filed some years after the assignment, to sell the mortgaged premises for payment of a balance due upon the note, It was HELD, that

- prize tickets which had not been presented to the managers of the lottery for payment, within the 12 months, could not be set off against the complainant's claim. *City Bank vs. Smith*, - - - - - 265
15. The prize tickets stipulated to be received in received in payment of the note, were intended to be available tickets, upon which the holders would be entitled to demand and receive, the prizes drawn to their respective numbers. They were those on which the prizes had been demanded within 12 months from the completion of the drawing, or on which the holder was entitled to demand the prizes, 12 months not having elapsed from the time of the drawing. - - - - - *Ib.*
16. Equity will relieve against penalties and forfeitures, where the matter lies in compensation, whether the condition on which they depend, be precedent or subsequent. But notwithstanding it will in many cases interpose to prevent the divesting an estate, it will not relieve against the non-performance of a condition precedent to the vesting of an estate, by giving an estate that never vested, and that by reason of the non-performance of a condition precedent, will not vest in law. - - - - - *Ib.*
17. D, in 1815, voluntarily assumed a trust over certain real property, to a part of the rents of which the complainants were entitled, and from that period until 1828, from time to time, every year, received large sums of money from the estate, which he continually employed in trade and speculation. To the bill against him for an account, he filed more than one defective answer, withholding the discovery sought for. He claimed the whole trust fund, in one answer, as belonging to his wife and children, who really owned a part; while in another, he set up an unfounded stale claim in a stranger, to a part of the fund. He endeavored in the progress of the cause to stifle the inquiry as to the use he had made of the money received, or the profits which had accrued from its use. He neither paid nor offered to pay the *c. q. t.* complainants any thing. **Held**, that under the circumstances he was liable to pay compound interest, estimated on the balance in his hands at the end of each year; and that having kept full and fair accounts of his receipts and expenditures, and in that respect faithfully discharged his duty as trustee, he had not forfeited all claim to commissions, but was entitled to half commission—5 per centum. *Diffenderffer vs. Winder*, - - - - - 311
18. H, in 1789, and in consideration that his mother would pay him £100 over his part of his father's personal estate, and all the debts due from her deceased husband, and also procure H a conveyance in fee of certain lands, agreed with her, as a provision for the younger children of the family, to convey to her or her heirs, or to such of the younger children and their heirs, as she should from time to time appoint, certain other lands, of which he was seised. A few days after this, H married. Upon a bill filed in 1826, by his widow for dower, it appeared that the mother in 1789, went into the possession of the land which H had agreed to convey—that in 1807, H uniting with his mother, executed deeds for this land to the defendants, and that the deeds with the agreement were put on record at the same time—**HELD**, that it appeared that the mother had complied with her part of the agreement, and was entitled to the conveyances from H, clear of any claim for dower on the part of his widow. *Cowman vs. Hall*, 398
Glenn vs. Hall, - - - - - 398
19. The neglect of a defendant to answer a bill, upon which a decree *pro confesso* is passed, amounts to an admission only of the allegations in the bill. *Robinson vs. Townshend*, - 413
20. The answer of infant defendants, calling upon the complainants to prove the bill, only puts them to the proof of what is charged, and entitles them only to a decree on the case made in the bill, when proved, - - - - - *Ib.*
21. An answer flatly denying an allegation in a bill, can only be overruled by the positive testimony of two witnesses, or of one aided by pregnant circumstances—such circumstances standing alone, without the aid of positive testimony, will not destroy the effect of

- an answer. *Roberts vs. Salisbury*, 425
22. Since the passage of the act of 1785, ch. 72, sec. 25, the practice of the Court of Chancery in *England*, in the case of a plea ruled to be sufficient, when set down for argument, to make the complainant pay £5 costs, is repealed, and a fine should be paid only by the party pleading or demurring, whose plea or demurrer is overruled. *Carroll vs. Waring*, - - - - - 491
23. When property in controversy is within the limits of the State, and the claimant resides abroad, the Chancery Court has an undeniable jurisdiction over the case. *Carroll vs. Lee*, - - - - - 504
24. So, where the defendant is within the State, and the land, or other property in contest, is beyond its limits, although the proceeding is in *rem*, the Court of Chancery has jurisdiction. To enforce a decree in such a case, the proceeding may be in *personam*, as well as by injunction, to recover the possession of the thing disputed. - - - - - *Ib.*
25. Where the property has been removed from the State, and the defendant resided out of its limits, his appearance to the suit, and answer to the bill, for the purpose of contesting the merits, is a waiver to any objection to the jurisdiction of the court, although in his answer he also excepts to it. - - - - - *Ib.*
26. One co-defendant in Chancery, may be examined against another. The answer of one, is not evidence against the other. *Stewart vs. Stone, et ux.* - - - - - 509
- See Action—right of, 1, 4.
 — Appeal, 1, 7, 9.
 — Cestui que trusts, 1.
 — Dower.
 — Evidence, 14.
 — Executors and Administrators, 2.
 — Insolvent Debtor, 4.
 — Judgment, 2, 3.
 — Lien.
 — Mortgage.
 — Pleadings in Equity.
 — Practice, 13, 14.
 — Trustee, 3.
 — British Statutes, 2, 3, 4.
- COVENANT.
- F, intending to build on his farm at C, and have the bricks made there, agreed with B under seal as follows:
- that is, "B contracts to make for the said F 300 m bricks on said farm, in the following proportions: not not less than one-fifth salmon; two-fifths red; two-fifths black. The first kiln to be ready for delivery in the month of May next. In consideration of which, F contracts with B to furnish free of expense, all the scantling and plank necessary for making the bricks; and pay B \$5,50 for every thousand of good merchantable bricks in the following manner: one-half of said amount of bricks to be paid for in pine wood, delivered at the stump, when called for, on said farm, at \$2,50 per cord; \$300 dollars to be paid when the first 100 m are delivered; \$300 when the second 100 m are delivered; and the balance when the contract is completed." HELD, upon the construction of this contract, that the engagement for the delivery of the wood, was an independent covenant on the part of F, with which he was bound to comply, without waiting for the burning of the first kiln of bricks. *Finley vs. Boehne*, - - - - - 42
- See Pleas and Pleading, 5, 6.
- CRIMINAL LAW.
- See Indictment.
- CUSTOM.
- See Bills of Exchange, 2.
- DECREE IN CHANCERY.
- See Court of Chancery, 2.
- DEED.
- See Ejectment, 1, 5.
 — Confirmation, 1.
- DEVASTAVIT.
- See Action—right of, 2.
- DISTRIBUTION.
- See Advancement.
- DONATION.
- See Action—right of, 4.
 — Feme Covert, 4.
- DOWER.
- A widow is not dowerable in Equity of lands which were held by her husband in the character of trustee. *Cowman vs. Hall*, - - - - - 398
Glenn vs. Hall, - - - - - 398

EJECTMENT.

1. The construction of a grant is for the court, and not a matter proper to be submitted to a jury, except in a case of latent ambiguity. *Thomas vs Goufrey*, - - - - 142
2. It is a well established rule of construction, that calls, whether to artificial or natural objects, are to be preferred to courses and distances; therefore, when a tract of land is described by courses and distances, and calls, the calls are to be gratified in the construction of the grant, if they can be established, and the courses and distances disregarded, if they do not correspond with the calls. - - - - - *Ib.*
3. Where there are two inconsistent expressions or calls, both of which cannot be gratified, but either of which standing alone would be imperative, that which appears to be the most certain, and most consonant to the intention apparent upon the face of the patent, should in the construction of it, be preferred, for the same reason that calls are preferred to courses and distances, because more certain. Or if there is any thing on the face of the patent to explain or qualify one of them so as to show, that the other was intended to be the governing or imperative call, it should be so treated. - - - - - *Ib.*
4. So where the patent for a tract of land described it as "beginning at a bound hickory on the side of a hill, on the S. side of the main falls of *Patapsco*, respecting to the *W. Chew's Resolution Manor*, and running with the said manor, S. &c. 200 p. to a bound hickory, then N. W. 340 p. to a bound white oak, then N. &c. 250 p. to the main falls of ———, with the main falls by a direct line to the first bound tree. *HELD*, that according to the construction of the patent, the first line thereof should be run from the first to the second bounded hickory, and that the words "running with the said manor," did not constitute a peremptory call, but like the course and distance, were directory only to the principal call, the tree. And that as to the home line, it should be run from the termination of the third line. direct to the beginning tree, the words "with the main falls," being qualified by the subsequent terms "direct line." *Ib.*
5. In an action of ejectment where defence was taken on warrant, and plots were returned, the defendant offered in evidence a deed for "all that part or parcel of land lying and being in, &c. as has been willed by the said W, (the grantor) to his said daughter, (the grantee) as will more fully show by reference to the said last will and testament, bearing date, &c. for 100 acres, it being designated by the *Old Cabin Farm*, it being likewise to be taken from that part or parcel of land the said W bought of H, to be laid off by the said W's executors, at his death, for 100 acres;" and also offered in evidence another deed between the same parties, which purported to confirm the first deed. The second deed described the land by metes and bounds. The two deeds were offered as constituting one valid deed. The first deed was not located on the plots, the second deed was. The will of W was not produced, nor did it appear that his executors had laid off any land for the grantee. *HELD*, that the first deed was void for uncertainty—could not be read because not located, and that the second deed could not operate as a confirmation of the first. *Blessing vs. House*, - - - - - 290
6. No title paper in an ejectment, where defence is taken on warrant, can be read in evidence, unless it is located. - - - - - *Ib.*
7. In 1818, the tenant in possession failing to appear after notice, to an action of Ejectment, judgment was rendered against the casual ejector. The plaintiff was then put into possession, under a writ of *habere facias* regularly executed. In 1827, C, claiming title to the land, by petition, in which the tenant in possession united, prayed the *County Court* to set aside the judgment, restore the possession, and admit the petitioners to defend the action, upon the usual terms; this being granted, the defendants afterwards moved the court, to stay all proceedings, upon payment to the lessor, the rent due to him at the time of bringing the suit and the costs.

This motion being also granted, the plaintiff appealed. **HELD**, that the County Court erred in striking out the judgment, which was entered upon the tenants failing to appear, after such a lapse of time, and that the lessor of the plaintiff was entitled to a writ of restitution. *Klinefelter vs. Carey*, - - - - 349

8. Wherever a judgment in ejectment has been stricken out upon the tenant's failure to appear, it has always been one of recent date. It has generally been, where the period had been too short for improvements of importance to have been made in the intermediate time, and where no trial had been lost. *Ib.*

ENDORSER.

See Bills of Exchange.

ESTATE TAIL.

See Wills and Testament, 2.

ESTOPPEL.

Where the condition of a bond recited that A was guardian, &c., neither the principal obligor nor surety therein, in an action upon such bond, can deny that he was guardian in the face of the recital, nor set up as a defence any supposed irregularity in obtaining the appointment. *Fridge vs. The State*, 103

See Presumption.

EVIDENCE.

1. The securities on an administration bond in a suit brought by a distributee against the administrator, are not competent witnesses to prove, that the assets of the deceased have been consumed in the payment of debts. *Owens vs. Collinson*, - - - - 25

2. It is not true as an uniform rule, that a creditor is a competent witness for administrators. He is only so, where the assets are sufficient for the payment of debts. Where they are not, whether the administrator be plaintiff or defendant, if the verdict swells the fund to which he must look for the payment of his debts, his incompetency is manifest; he is only competent when the verdict cannot affect his interest. *Ib.*

3. The bail of the defendant is not a competent witness for him, - *Ib.*

4. In an action upon an administration bond against a surety, the administrator is not a competent witness for the defendant. The witness is responsible for costs, in case of a recovery against the defendant. - - - - *Ib.*

5. Accounts settled in the Orphans Court, by executors, administrators and guardians, are *prima facie* evidence in all suits touching the matters therein contained, to which they are parties; and the *onus probandi* rests on him who seeks to impeach their correctness. - - *Ib.*

6. Upon a bill against an alleged intruder for an account of the rents and profits of the complainant's estate, accruing during her minority, her guardian is not a competent witness to prove an agreement between himself and the defendant, that the defendant should keep the estate, and pay the rents to the complainant and her sister, who were jointly interested. It was the duty of the witness to have collected the rents, and accounted for them. He is therefore interested in sustaining the suit. *Hungerford vs. Brown*, - - - - 133

7. Where A and B, who were partners in trade, became embarrassed about the 17th March, and on the 27th applied for a discharge under the insolvent laws, and where, as between the permanent trustee of the insolvents and the defendant, the inquiry was, whether a certain transfer of property made by the insolvents, on the 19th, to the defendant, then a creditor, was made with a view, or under an expectation of being or becoming insolvent debtors, it was held, that for the purpose of enabling the jury to find when the intent to seek relief under the insolvent laws originated, declarations of one of the insolvent partners, made a few days before the 20th, that if certain creditors came on them, they must stop payment, or petition—that bills of sale of household furniture executed by them on the 21st, and declarations of one of the insolvents, made at the same time, that the grantee therein (who was not the defendant) had advanced money to the partners, and they wished to secure him in consequence of the situation they were placed in,—and that en-

- tries in the day book of the insolvents, dated the 19th, 20th, 21st, and 23d, shewing a delivery of goods and notes to various persons, and among others, to the defendant, were all competent evidence for that object, as surrounding circumstances of the transaction, and a part of the *res gestæ*. *Kolb vs. Whiteley*, - - - - - 188
8. When declarations of persons, not parties to a suit, constitute a part of the transaction under investigation, they are admitted in evidence to show its character, or the speaker's intention. - - - - - *Ib.*
9. The blank endorsement and delivery of a bond invests the holder with the right of collecting, or suing for, in the name of the assignor, the money due upon such bond; and of appropriating the same to his own use. It is *prima facie* evidence of title to such bond in the assignee, and he may write a formal assignment over the assignor's signature. *McNulty vs. Cooper*, 214
10. The current of decision in modern times, both in *England* and the *United States*, has set against all objection to the admissibility of a witness, unless his interest be a legal interest. There is no other safe standard of exclusion than a legal interest. *Stimmel vs. Underwood*, 282
11. It is no objection to the competency of a witness, that he had been heard to say some months before the trial, he felt himself bound to pay the plaintiff the amount of the controversy, if the plaintiff did not recover, the witness having been since released by the plaintiff. *Ib.*
12. A mistaken belief, or an honorary obligation, on the part of a witness, that he is bound, or ought to pay the plaintiff's claim, in case he should not recover in the action, does not render the witness incompetent, - - - - - *Ib.*
13. Evidence of unsworn declarations of a witness is inadmissible to impeach his competency. - - - *Ib.*
14. Accounts stated by the auditor of the Court of Chancery which have not been confirmed by the Chancellor, are no evidence of the truth of the facts assumed by the auditor in stating them. *Liffenderffer vs. Winder*, - - - - 311
15. In an action of replevin for a negro slave, the plaintiff proposed to prove by his former guardian, that the negro in controversy was the plaintiff's property; but it appearing, that this negro constituted a part of the plaintiff's estate during his minority, and during one period thereof had been in the witness's possession, the *County Court* held the witness incompetent. Upon appeal this was reversed. *Watts vs. Garrett*, - - - - - 355
16. When the competency of a witness is objected to on the ground of interest, the interest should appear. It should be seen by the court, in order that it may be able to determine its character, and whether it be such as to amount to a disqualification. It should not rest in mere conjecture or speculation, but should be certain and direct, and not possible only. Where the interest is of a doubtful character, the objection goes to the credit, and not the competency of the witness. - - - - - *Ib.*
17. Parol evidence is admissible to establish the date of the delivery of an execution to the sheriff, where no endorsement of the time was made on the writ, as the statute demands of that officer. *Hanson vs. Barnes*, - - - - - 359
18. Neither an endorsement of the time of the delivery of a writ of *fi. fa.* to the sheriff, nor evidence of that fact, is necessary in making title to lands purchased under that writ—Nor is it necessary as to personal property, except as against purchasers. - - - - - *Ib.*
19. The inventory of a deceased testator's estate, and the accounts thereof, as filed in the Orphans Court by his executor, are admissible evidence in an action of *assumpsit*, brought by a child of the deceased, against the executrix of such executor; the latter having been the guardian of the child, and the object of the suit being to recover property of the ward, which he as guardian, was charged with having converted to his own use, and assumed to pay upon the liability resulting from the conversion. *Green vs. Johnson*, - - 389
20. Evidence offered to the jury for a particular purpose, may be properly rejected, though it might be admissible for some other object

in the same cause. *Sothoron vs. Weems*, - - - - - 385

21. It is an established principle of evidence, that the answer of one defendant cannot be received in evidence against a co-defendant. If the complainant wishes to establish a fact, by the evidence of a co-defendant, he may be examined as a witness on interrogatories, which will afford the defendant an opportunity to cross examine him. *Stewart vs. Stone*, - - - - 509
- See *Allegata et Probata*.
- Court of Chancery, 4, 19, 20, 21, 26.
- Indictment, 2.
- Judgment, 1, 2, 3.
- Malicious arrest, 4, 5.
- Bills of Exchange and Promissory notes, 3.

EXECUTION.

1. The death of a defendant before a levy on a *fi. fa.*, in the hands of the sheriff prior to such death, does not render a *sci. fa.* against the heirs and *terre tenants* necessary; the sale under a *fi. fa.* thus issued and levied, passes title to the purchaser. *Hanson vs. Barnes*, - - - - 359
2. The writ of *fi. fa.* requires no order or action of the court, to give the plaintiff the fruits of his execution. These are reaped when the sheriff discharges his duty under the process. - - - - *Ib.*
3. Judicial writs do not in general abate by the death of the party. *Ib.*
4. If a sheriff's sale under a *fi. fa.* can be impeached, upon the ground of due notice of the sale not being given, that fact must appear affirmatively—for every thing is to be presumed in favor of the performance of his duties. - - - *Ib.*
5. Where goods taken under a *fi. fa.* have been sold for a part of the amount due on the judgment, a *ca. sa.* cannot be legally issued for the residue until the sheriff has made a final return of the *fi. fa.* showing what has been done with the property. This return should be in term time; if made in the recess to the clerk's office, it is void. The same principles apply to a *venditioni exponas*. *Turner vs. Walker*, 377

See Evidence, 17, 18.

- Judgment, 4.
- Statute of frauds, 2.
- British Statutes, 2, 3, 4.

EXECUTORS AND ADMINISTRATORS.

1. The allowance for commissions made to a collector under letters *ad colligendum*, granted upon a deceased person's estate, ought to have no effect upon the commissions of the executor or administrator of the same estate. They are distinct and independent allowances for different services. *Wilson vs. Wilson*, 20
 2. An administrator, who, being called upon in Chancery to account, comes promptly into court, answers the bill, and submits all his accounts and vouchers, and furnishes the means of detecting the errors which are fairly attributable to him, is not to be presumed guilty of a fraudulent concealment of credits actually omitted. *Owens vs. Collinson*, 25
 3. If an executor or administrator, *bona fide*, without any knowledge of its injustice, pay a claim previously passed by the Orphans Court, though not proved in the manner prescribed by the testamentary system, such payment is not made at his risk. To a credit therefor, he is not only *prima facie* entitled, but his right to it cannot be controverted. So if he retain the amount of his own claim thus passed. - *Ib.*
 4. Under the act of 1789, ch. 101, sub-ch. 14, sec. 2, it is clear that the Legislature did not mean to make any thing, the subject of administration in the hands of the adm'r, *d. b. n.* which did not exist in specie. The act of 1820, ch. 174, sec. 3, extended such an administration to bonds, notes, accounts and evidences of debt, which a deceased executor or administrator may have taken, received, or had in that character, and to money in his hands, and gives power to the adm'r *d. b. n.* to recover the same by an action on the bond. *Sibley vs. Williams*, - - - - - 52
 5. An administrator, who has confessed judgment and thus admitted assets, being a creditor himself, may, as against the heirs of his intestate, for the purpose of subjecting the real estate to his claim, show that in fact the assets are not sufficient to pay all the creditors. *Gaither and Warfield vs. Welch*, 259
- See Action, right of, 2.
- Advancement, 1, 2.

See Appeal, 4.

— Court of Chancery, 3, 4.

— Evidence, 1, 2, 4, 5, 19.

— Interest, 1.

— Judgment, 2, 3.

EXECUTORY DEVISE.

See Wills and Testaments, 1, 2.

FACT.

See Practice, 9, 10.

FEME COVERT.

1. A separate estate in a wife, in personal chattels, was unknown to the common law; like her person, her property was under the control of her husband. *Carroll vs. Lee*, 504

2. A separate property may now be held by a married woman, through the intervention of a trust, and even without the interposing office of a trustee. - - - - - *Ib.*

3. To exclude the marital rights over her property, a clear intention in the donor, that it shall be for her separate use, must appear. No technical words are necessary, but adequate language must be employed in making a gift, to manifest a decided intention to transfer a separate interest. - - - - - *Ib.*

4. A gift of plate to a married woman, unexplained as to intention, is a gift, to which the marital rights instantly attach, and the thing given, immediately becomes the property of the husband. - - - *Ib.*

See Insolvent Debtor, 1, 2.

FIERI FACIAS.

See Execution, 1, 2, 3.

FOREIGN LAWS.

See Lex Loci, 2.

FORGERY.

It is not now held to be essential to the offence of forgery, in any case, that some one must have been injured. It is sufficient, if the instrument forged, supposing it to be genuine, might have been prejudicial. The question whether a particular instrument is capable of supporting a charge of forgery, is referrible not to the form, but to the substance of it. *Arnold vs. Cost*, - 221

See Slander.

FRAUD.

See Court of Chancery, 12, 17.

— Statute of Frauds.

GARNISHEE.

See Practice, 8.

GRANT.

See Ejectment, 1, 2, 3, 4.

GUARDIAN AND WARD.

1. A female, under the age of 21, cannot execute a release to her guardian, though she has capacity to receive payments from him at the age of 16—A release, which affords more protection to a guardian than a mere receipt, is in its nature and tendency to the prejudice of the infant, and opposed to sound policy. *Fridge vs. State*, 103

2. The promissory note of a guardian given to an *infant* female ward over the age of 16 years, is no payment. - - - - - *Ib.*

3. It is the duty of a guardian to a female ward, on her arrival at the age of 16 years, to exhibit a final account to the Orphans Court, and to deliver to the ward all her property in his hands. So far as the property of a ward in the guardian's hands consists of money, this constitutes a contract to pay money when she attained the age of 16, which is a day sufficiently certain in case of failure to pay, to entitle the ward to interest absolutely. - - - - - *Ib.*

See Bond, 1.

— Estoppel, 1.

— Evidence, 6.

— Infants, 1.

— Orphans Court, 3.

— Pleas and Pleading, 10.

HOTCH-POT.

See Advancement, 1, 2.

HUSBAND AND WIFE.

See Feme Covert.

INDICTMENT.

1. In an indictment for an assault with intent to murder, it is not necessary to state the instrument, or means made use of by the assailant, to effectuate the murderous intent. *State vs. Dent*, - - - 8

2. The means of effecting the criminal intent, or the circumstances evincive of the design with which

the act was done, are considered to be matters of evidence for the jury to demonstrate the intent, and not necessary to be incorporated in an indictment. - - - - - *Ib.*

3. It is sufficiently certain in an indictment to describe the article stolen as "one hide of the value," &c. *State vs. Dwell*, - - - 310

See Act of Assembly 1 and 2.

— Forgery, 1.

— Slander, 1.

INFANTS.

1. Some contracts made by infants are binding, such as contracts for necessities. Some are void; and others are voidable only, such as contracts that may be for the benefit of the infant. A contract that a court can see and pronounce to be to the prejudice of the infant, is void. *Fridge vs. the State*, - - 103

See Guardian and Ward, 1, 2, 3.

— Pleas and Pleading, 10.

INSOLVENT DEBTORS.

1. The Commissioners of Insolvent Debtors for the city and county of *Baltimore*, after having appointed a permanent trustee, and certified to *Baltimore County Court*, that the debtor hath *not* complied with the terms and conditions of the insolvent laws, may, upon the neglect of such trustee to give bond within a reasonable time, appoint a new permanent trustee. *Glasgow vs. Sands*, - - - - - 96
2. The *choses in action* of a deceased wife, vest in the trustee of her surviving husband, on an application for a discharge under the insolvent laws, although the husband is reported against, and does not obtain a final release. - - - - - *Ib.*
3. In an action by the permanent trustee of an insolvent debtor, under the system for the city and county of *Baltimore*, it is not necessary to produce an assignment from the provisional trustee to him, of the insolvent's effects, nor to show that a majority of the insolvent's creditors recommended him to the commissioners of insolvent debtors as permanent trustee, to support his right to sue in that character. *PER HARFORD COUNTY COURT. Kolb vs. Whitely*, - - - - - 188
4. In a suit in Chancery by the permanent trustee of an insolvent debt-

or, it is necessary to show, that the complainant gave bond with surety in that character before filing his bill, and although the allegation in the bill, to that effect was admitted in an answer by one defendant, yet as respects another defendant, whose answer was silent in relation to that fact, proof of the bond with surety was held requisite. *Stewart vs Stone*, - - - - - 509

See Bail, 1.

— Evidence, 7, 8.

— Practice, 1.

INSURANCE.

1. An insured is not compelled in any case to abandon. He has an election which rests in his discretion; but no right to claim for a technical or constructive total loss unless, until such election is made. *Bostley vs. Chesapeake Insurance Co.* - 450
2. An election to abandon for a total loss cannot be made, until receipt of advice of the loss. - - - *Ib.*
3. Intelligence of the loss of a ship derived from a newspaper, is sufficient advice to authorise an insured to abandon upon. - - - *Ib.*
4. The information which is sufficient to authorise the assured, to give notice to the underwriter, that he abandons, must be of such facts and circumstances as would sustain the abandonment, if existing in point of fact at the time the notice is given. - - - - - *Ib.*
5. The mere stranding of a vessel, does not of itself, form a substantive ground of abandonment. The right to abandon on such an occurrence, depends on the attending circumstances. - - - - - *Ib.*
6. So where the assured addressed the following note to the underwriter: "I observe by the *Boston* newspaper of the 29th January, that the ship *S*, insured in your office, was driven ashore in a heavy gale of wind, the 6th of December, and by a *Charleston* paper of the 26th of January, that on the 13th she was not got off. In so dangerous a situation as *Helvoet* roads, it is to be feared a total loss has ensued, I therefore as a measure of precaution both for your interest and my own, abandon to you, and claim a total loss." *HELD*, that this letter did not state to the underwriter, a sufficient reason for the offer to abandon. *A*

mere apprehension that a total loss may have taken place, does not authorise the offer, - - - *Ib.*
See New Trial.

INTEREST.

Interest is not to be charged on money retained by an administrator with the sanction of the Orphans Court and consent of parties, to meet the future contingencies of the estate. *Wilson vs. Wilson*, 20

See Compound Interest.

— Court of Chancery, 17.

— Guardian and Ward, 3.

INTERLOCUTORY DECREE.

See Appeal, 6, 7, 9.

INTERLOCUTORY ORDER.

See Appeal.

JUDGMENT.

1. The judgment of a court of competent jurisdiction, is, as to all matters decided by it, conclusive; and cannot be afterwards questioned by any other tribunal, when coming in incidentally. *Fridge vs. State*, - - - 103

2. Absolute judgments at law obtained by a creditor of a deceased against his executor or administrator, amount to an admission of assets, and cannot be resisted on the ground of a deficiency of assets; but as between a creditor and the heir at law, in a proceeding to subject the real estate to the payment of his debt, such a judgment is not conclusive, but the creditor may show a deficiency of assets. *Gaither and Warfield vs. Welch*, - - 259

3. A judgment against an executor or administrator, does not furnish any evidence of the original debt, against the heir at law, in a proceeding to sell the real estate for the payment of debts, on the ground of a deficiency of assets. - - *Ib.*

4. It is a general principle, that where a new person is to be benefited, or charged by the execution of a judgment, there ought to be a *scire facias* to make him a party; but this principle does not apply to a case, where the new party becomes interested after the process is in the hands of the officer for execution. *Hanson vs. Barnes*, - 359

See Ejectment, 7, 8.

— British Statutes, 2.

JURISDICTION.

No action at law will lie to enforce a decree in Chancery within the territorial jurisdiction of the Court of Chancery. That Court enforces its own decrees. *Richardson vs. Jones*, - - - 163

See Action—right of, 4.

— Appeal, 4.

— Cestui que trusts, 1, 2.

— Court of Chancery, 8, 9, 23, 24, 25.

— Presumption, 1.

JURY.

See Ejectment, 1.

— New Trial.

— Practice, 9, 10, 11.

— Trespass, 2.

LEVY COURT.

1. The Levy Court of Baltimore county, having omitted to make the levy for the year 1823, between the 1st March and 31st of December of that year, as they were bound to do by the act of 1817, ch. 22, were authorised by the act of 1823, ch. 23, to “make and close the levy for 1823, on or before the 1st of March, 1824.” HELD, that as the collectors of the levy were not to be appointed before the assessment was made, the act of 1823 carried with it an extension of the time for appointing those officers; or if it did not, their appointment under the act of 1817 was not restricted, as the laying of the levy was, to the 31st December of the year for which the tax was levied. *Levy Court vs. Dorsey*, - - - 75

2. The Levy Court being a corporation, had power to accept and approve the bond of a collector appointed to collect the levy authorised by the act of 1823, though not executed and filed with them until the 3d of March, 1824. - - *Ib.*

See Pleas and Pleadings, 7, 9.

— Practice, 7.

LEX LOCI.

1. It is an universal principle, governing the tribunals of all civilized nations, that the *lex loci contractus* controls the nature, construction, and validity of the contract. The exceptions are, where it would be dangerous, against public policy, or of immortal tendency, to enforce

- that construction here. *Trasher vs. Everhart*, - - - - - 234
2. The *lex loci contractus* is never looked to, to determine the remedy which should be used, and the process to be issued, to enforce a contract. These are determined by the *lex fori*. So an action of *assumpsit* cannot be maintained here, upon a single bill made in *Virginia*, which, according to the laws of that State, is not a specialty, but according to our law, is. - - *Ib.*

LIEN.

An implied lien for the purchase money of land where the vendor has parted with the legal title, will not be enforced against a subsequent purchaser, without notice. *Roberts vs. Salisbury*, - - - - - 425

See British Statutes, 2, 3, 4.

— Mortgage, 1.

LIMITATION OF ACTIONS.

1. By the act of November, 1765, *ch.* 12, it is declared, that if a person who is liable to an action, shall be out of the province at the time the cause of action hath accrued, he shall have no benefit or advantage from the act of 1715, *ch.* 23, (the act of Limitations) provided the person who has such cause of action shall prosecute the same, after the presence, in this province, of the person liable thereto, within the time or times limited, in and by the said act of 1715. HELD, upon the construction of this act :

1. That the acts of 1715, *ch.* 23, and 1765, *ch.* 12, are to be taken together, and to receive a construction to carry into effect the plain and obvious intention of the Legislature, that limitations should not attach against a creditor, where the debtor was absent from the State, at the time the cause of action accrued.

2. That if at any time after the cause of action accrued, the debtor, by his presence in the State, afforded the creditor an opportunity to prosecute his writ with effect, he should institute his action within the time required by the act of 1715, or his claim would be barred by limitations.

3. To bring a case within the act of 1765, the presence of the debtor within the State must be such as to enable the creditor to avail himself

of it; a secret, concealed, clandestine presence for any length of time, of which the creditor could not take advantage, would not be sufficient. It must be so public, and under such circumstances, as to give the creditor an opportunity, by the use of ordinary diligence and due means, to arrest the debtor. *Hysinger vs. Baltzell*, - - - - - 158

2. Where a cause of action accrued in October, 1822, when the defendant was a resident of another State, and it appeared, upon a case stated, that the defendant was in *Baltimore*, where the plaintiff resided, in April, 1823, "purchased other goods from the plaintiff, and remained there for two days." It was HELD, that limitations did not then attach, because it did not appear at what time during those two days, the defendant made his purchase; nor whether the plaintiff had an opportunity to sue out a writ against him with effect. - *Ib.*
3. The Statute of Limitations is a bar to an action of *assumpsit*, brought by a child of a deceased against the executrix of his executor; the latter having been the guardian of the child, and the object of the suit, being to recover property of the ward, which he as guardian, was charged with having converted to his own use, and assumed to pay for, upon the liability resulting from such conversion. *Green vs. Johnson*, - - - - - 389
4. Limitations apply to the action of account. - - - - - *Ib.*
5. As soon as a trust ceases to be a continuing subsisting trust, or expires by its own limitation, or is put an end to by the act of the parties, if it be a fit subject for a suit at law, a cause of action arises, and the act of limitations begins to run. - - - - - *Ib.*
6. The payment of interest upon a bond, is no avoidance of the Act of Limitations of this State, nor will even an express acknowledgment of the debt revive the remedy upon a bond barred by that act. *Carroll vs. Waring*, - - - - - 491
- See Court of Chancery, 1.
- Pleadings in Equity, 5.

MALICIOUS ARREST.

1. An action upon the case is the proper remedy against one who maliciously procures a *ca. sa.* to be is-

sued, and another to be arrested under it. *Turner vs. Walker*, 377

2. The foundation of such an action is malice, and a want of probable cause, which must be proved. *Ib.*
3. The fact of malice is always a question for the jury. - - *Ib.*
4. Malice may be, and most commonly is, in such actions, implied from the want of reasonable or probable cause, that being first established. But the presumption of malice resulting from the want of probable cause is not conclusive, and the defendant, for the purpose of rebutting the inference of malice, may be let in to show, for instance, that he acted under the advice of counsel. The effect of such evidence, is however, for the jury. *Ib.*
5. Evidence of the conduct and declarations of the defendant in relation to, and in the course of the transaction—of the situation of the parties—of the nature and extent of the injurious means resorted to by the defendant to effect his object, and of his forwardness, zeal and activity manifested in the procurement and use of the means employed, may properly be adduced to prove malice. - - - *Ib.*

See *Procedendo*, 1.

MONEY HAD AND RECEIVED.

See *Bills of Exchange*, 1.

MORTGAGE.

The vendor of land who parted with the legal title, and took a mortgage of the same land from his vendee, which he neglected to record in due time, cannot enforce his mortgage against a subsequent purchaser from the vendee, without notice. *Roberts vs. Salisbury*, - - - 425

See *Court of Equity*, 14, 15.

NEW TRIAL.

Upon a motion for a new trial, the depositions of Jurors, who tried the cause, cannot be received to show, either misbehaviour or mistake. *Bosley vs. Chesapeake Ins. Co.* 473

Note,—*PER ARCHER, J.*

NOTICE.

See *Mortgage*.

— *Bills of Exchange*.

ORPHANS COURT.

1. Accounts settled by the Orphans Court, and *prima facie* evidence. *Owens vs. Collinson*, - - - 25
 2. The Orphans Courts are tribunals invested by law, with the power of passing claims against the estates of deceased persons. - - - *Ib.*
 3. The appointment by the Orphans Court, of a person as guardian, who at the time was one of the judges of the court, cannot be afterwards questioned in an action upon his bond, though at the moment of the appointment, the court could not have acted without the concurrence of the individual appointed. *Fridge vs. State*, - 103
- See *Appeal*, 4.
 — *Court of Chancery*, 3, 4.
 — *Executors and Administrators*, 1.
 — *Guardian and Ward*, 3.
 — *Interest*, 1.
 — *Presumption*, 1.

PARTIES.

- See *Appeal*, 1, 2, 3.
 — *Bills of Exchange*, 4, 5.
 — *Execution*, 1.
 — *Judgment*, 4.
 — *Pleas and Pleading*, 4.

PAYMENT OF DEBTS.

- See *British Statutes*, 2, 3.
 — *Judgment*, 3, 4.

PLEAS AND PLEADING IN EQUITY.

1. Where a testator charges both his real and personal estate with the payment of debts and legacies, and a purchaser of the real estate desires to have his bonds given for the purchase money, applied to release his purchase from the charge in the will, it should regularly appear upon the face of his bill that the whole personality had been applied towards the payment of debts and legacies. That must appear before a Court of Equity could decree the land to be liable for such purpose, and ought to be expressly averred. *Hoye vs. Brewer and Troup*, - - - - - 153
2. That averment is so essential, that where it ought to have been made, and was not, although it was stated in the decree passed by the County Court, that the solicitors of the defendants admitted the

whole of the personal estate to have been applied towards the payment of debts and legacies, yet as a party must always obtain redress according to his allegations and proofs, the appellate court reversed the decree containing that statement, but without prejudice. - *Ib.*

3. Where a bill for dower alleged that the complainant's marriage with her deceased husband took place "on or about the year seventeen hundred and —," and called upon the defendant to answer whether "she was not married as stated." And the answer after setting out an agreement of the 14th January, 1789, alleged that "the marriage took place some time after that agreement," it was HELD, that this allegation, both as respects the fact and time of marriage, was responsive to the bill, and must stand as conclusive of those facts, not being contradicted by any evidence. *Cowan vs. Hall*, 398. *Glenn vs. Hall*, - - - - - 398

4. An annuity payable out of the rents and profits of real estate, being in arrear, the devisee filed her bill against the infant devisees of the land, their guardian, and the personal representative of the testator, alleging the annuity to be a charge on the land and its profits, and praying for an account—that the lands may be sold,—the proceeds applied to the payment of the annuity, so far as necessary, and the balance invested to meet future instalments, and for general relief. HELD, that as the bill contained no allegation or suggestion of the receipt of the rents and profits by the defendants, or any of them, nor of the annual value of the land, nor of the application of the rents and profits, and did not call upon the defendants to make any disclosures upon these subjects, there was no issue, to which evidence, which had been taken in the cause in relation to them, could apply, and that there could be no decree *in personam* against the defendants, under this state of the pleadings. *Robinson vs. Townshend*, - - - - - 413
5. Where it fully appears, upon the face of a complainant's bill, that there had been a sufficient lapse of time to make the bar created by the

Act of Limitations, a defence to the suit, it is not necessary to verify the plea of Limitations by an oath; nor is it necessary to support such a plea by an answer, where there was nothing charged in the bill in avoidance, or which could take the case out of the Statute of Limitations. *Carroll vs. Waring*, 491
See Court of Chancery, 1, 2, 20, 21.

PLEAS AND PLEADING.

1. Y sued out a writ in trespass upon the case against M, J R, and S, and filed a declaration, counting upon their note as co-partners. M, only was arrested. At the return term of the writ he pleaded as follows: "And the said M comes and says, that he is in no wise guilty of the trespass aforesaid, as the said Y above, complains against him; for plea he says, that the said W R, who in the said writ is called J R, one of the defendants, is dead, and that he died before the suing out of the said writ of the said M, to wit, at, &c. and this, &c. Whereupon he prays judgment of the writ aforesaid, and that it may be quashed." HELD, upon a special demurrer, that this was a valid plea in abatement. *McLaughlin vs. De-Young*, - - - - - 4
2. A plea in abatement of the writ, is one which shows ground for abating or quashing it, without at the same time denying the right of action itself; and if a plea begins in bar, though it contains matter in abatement, it will be treated as a plea in bar. - - - - - *Ib.*
3. An informal or repugnant protestation does not on demurrer vitiate a plea. - - - - - *Ib.*
4. The death of one of the parties named as defendant in a writ, before the impetration of it, is ground of abatement. - - - - - *Ib.*
5. In an action upon a contract under seal, where the declaration assigns and relies upon specific breaches, on which the issues are made up, the court will not consider whether the plaintiff has delivered the articles for which he claims compensation within the time limited by the contract, if that inquiry is not necessarily involved in the issues as joined, nor determine the effect of such an omission upon the rights of the parties. *Finley vs. Boehme*, 42

6. The plea of general performance, when relied on as an answer to a specific breach assigned in a declaration in covenant, must either be regarded as a nullity, or as putting in issue the acts of commission or omission imputed to the defendant as violations of his contract. - *Ib.*
7. Where a Levy Court was abolished pending a suit brought in the name of the State, for the use of such Levy Court, against the obligors in a collector's bond, it was **HELD**, that a plea in abatement *puis darrein continuance*, that the Levy Court had been extinguished, was no objection to the further prosecution of the action. *Levy Court vs. Dorsey*, - - - - 75
8. In an action of debt on a bond with a collateral condition, where the defendant has pleaded general performance, and the plaintiff replied assigning a breach of the condition, it is a departure for the defendant to allege in his rejoinder, matter which shows the bond never had any legal existence. - - *Ib.*
9. It is a sufficient breach of the condition of a collector's bond, taken in pursuance of the acts of 1794, ch. 53, and 1817, ch. 142, that the collector did not finish and complete the collections of the assessment or rate imposed, &c. placed in his hands and accepted by him for collection, within one year and six months after the delivery to him of the copy of the account of assessment, and list of taxables required to be delivered to each collector. - - - - - *Ib.*
10. In an action in the name of the State, the obligee in a guardian's bond, the non-age of the *cestui que use*, the ward, who was more than 16, is no defence, and does not form the fit subject of a plea. *Fridge vs. State*, - - - - - 103
11. Where the declaration averred that a negotiable note was endorsed, before it fell due, and it appeared upon the production of the note, that it was endorsed after maturity, this was held to be no material variance. *Penn vs. Flack and Cooley*, - - - - - 369
12. It is generally true, that in an action for a malicious prosecution, or a malicious arrest, malice—the want of probable cause, and also the determination of the prosecution, or of the suit in which the writ was sued out, must be averred and proved. *Walker vs. Turner*, 377
13. But where a *vendi.* was sued out, returnable to *March*, and the sheriff in fact executed that writ, and returned it to the clerk's office in *December*, and the plaintiff then sued out a *ca. sa.* which was also returnable to the same term, with the *vendi.* under which the defendant was arrested and imprisoned in *December*, the reason for averring in an action upon the case, the want of probable cause for the arrest, and the determination of the suit, does not exist, and a declaration showing the facts specially, in the absence of the ordinary averment, would be sufficient. - - - - - *Ib.*
14. In a court of law there is no such head of pleading as trusts. *Green vs. Johnson*, - - - - 389
- See Allegata and Probata.
- Bills of Exchange, 1.
- Indictment, 1, 2.
- Practice, 8.
- Slander, 1.
- Trespass, 3.

PRACTICE.

1. It has long been the established practice of our courts, upon the production of a release of the principal under the Insolvent Laws of another State, by the special bail, to enter an *exoneretur* of the bail. *Richmond vs. De Young*, - - 64
2. M and J gave their joint and several single bill, upon which an action was brought against the administrator of J. The defendant moved the court for a non-suit under the act of 1825, ch. 167, suggesting, that M was alive, and within the county at the institution of the suit. The County Court decided that a motion was a proper mode of bringing the question before the court, and awarded a non-suit. **HELD**, upon appeal, that the act of Assembly had no application to the case. *Blizzard vs. Jacobs*, 66
3. Where two obligors united in a bond, and one of them is dead, the 1st section of the act of 1825, ch. 67, does not prohibit separate actions against the survivor, and the representative of the deceased; nor does it apply where only one suit

- has been brought, although all the obligors are alive, and reside in the same county. - - - - - *Ib.*
4. Where the obligors are all alive and reside in the same county, and the obligee elects to sue one of them only, he cannot bring another suit afterwards against the others, without being subject to a non-suit. *Ib.*
5. The office of the 2d section of the act of 1825, ch. 167, is to provide for the case of the death of one or more joint and several obligors, where the judgments being different, the surviving obligor or obligors cannot be united in the same action with the representative of the deceased obligor or obligors. There the creditor at his election may have one or two suits, one against the survivor, and another against the representative. Yet if there be more than one survivor living in the same county, he is as to them, restrained to one suit. *Ib.*
6. Where obligors live in different counties, the creditor may sue both, or either, at his election. He is however restricted, as to original parties to his bond, to one suit in each county. - - - - - *Ib.*
7. When a suit is brought on a private bond, &c. for the use of an individual, such person is not the legal plaintiff. The use is only entered for the protection of his equitable interest. If the c. q. u. dies pending the suit, his death is not the subject of a plea; nor is there for the purpose of the suit, any necessity for suggesting his death. The suit goes on as if he was still living or the use had never been entered. There is no reason why in the case of a public bond, with the privilege secured to any person interested to bring suit upon it, there should be any difference. *Levy Court vs. Dorsey*, 75
8. In attachment causes, as against the garnishee, according to our practice, the short note filed at the time of issuing the attachment, is substituted for a declaration. *Trashier vs. Everhart*, - - - - - 234
9. It is in general true, that foreign laws are facts which are to be found by the jury; but this rule is not applicable to a case in which the foreign laws are introduced for the purpose of enabling the court to determine, whether a written instrument is evidence. In such case, the evidence always goes in the first instance, to the court, which, if the evidence be clear and uncontradicted, may, and ought to decide, what the foreign law is, and act accordingly. - - - *Ib.*
10. If what the foreign law is, be matter of doubt, the court may decline deciding it, and may inform the jury, that if they believe the foreign law attempted to be proved, exists, as alleged, then they ought to receive the instrument in evidence, if not, they should reject it. - - - - - *Ib.*
11. In an attachment cause, upon a short note in *assumpsit*, the plaintiff proved a single bill of the debtor, as his cause of action, and proposed to prove to the jury, that the instrument of writing in question, was executed in *Virginia*, for the purpose of showing, that by the laws of that State, a single bill is not a specialty. The County Court permitted the evidence to go to the jury. *HELD*, upon appeal that the evidence was for the Court exclusively. - - - - - *Ib.*
12. The undertaking of a security for costs upon the record may be stricken out, and a new and sufficient security, in the discretion of the court, substituted, to make the first security a witness for the plaintiff. *PER FREDERICK COUNTY COURT. Stimmel vs. Underwood*, 282
13. Where the Appellate Court reverses the decree of the Court of Chancery, it exercises as it were an original equity jurisdiction, and places that decree upon the record, which the Chancellor ought to have given. Upon cross appeals, therefore, from the same decree, errors of which one party below, since the Act of 1825, could not have availed himself upon his appeal, because not excepted to, may be corrected by this court in remodelling the Chancellor's decree upon the appeal of the other party. *Diffenderffer vs. Winder*, - - 311
14. The Court of Appeals will direct an audit to be made, and new accounts stated, where it is necessary to enable them to pass a final decree in the cause. - - - *Ib.*
15. In March, 1825, a writ of *fi. fa.* was sued out, which the sheriff re-

turned at the return day. In July, a *vendi* issued founded upon that return; this being returned and not executed, another *vendi* was issued, which was returned to April term, 1827, executed, and the proceeds of the property sold, paid to plaintiff's attorney. At April term, 1828, the defendant in the execution, moved to quash the last *vendi*, and the return thereto, for various alleged irregularities. HELD, that the motion not being made at the return term of the writ, nor while the proceedings were in *fieri*, was too late. *Waters vs. Peach*, - 408

16. Where a variety of facts have been proved, a prayer making a partial enumeration of them, and thereupon asking an instruction to a jury, will not be granted, if not sustained by a consideration of all the facts proved, which belong to the question, whether enumerated or not. *Bosley vs. The Chesapeake Insurance Co.* - - - - 450

See Appeal, 5, 11, 12.

— Cestui que trust, 2.

— Ejectment, 7, 8.

— New Trial.

— Pleas and Pleading, 10.

PRACTICE IN EQUITY.

See Court of Chancery, 19, 20, 22.

— Pleadings in Equity.

PRESUMPTION.

1. In an action upon a bond entered into by a guardian appointed by the Orphans Court, brought for the use of the ward, the mere fact that at the time of the guardian's appointment, a natural guardian was in existence, does not invalidate the appointment and so render the bond a nullity. That court having jurisdiction to appoint a guardian in certain cases, even where there is a natural guardian, must be presumed to have acted rightly, when the question of the validity of the appointment arises incidentally, and nothing more than the existence of natural guardian appears. *Fridge vs. State*, - - - - 103

PROCEDENDO.

Where the plaintiff, who had obtained a verdict in an action for a malicious arrest, died pending an appeal, the court, on reversing the judgment upon a bill of exceptions,

refused a *procedendo*. *Turner vs. Walker*, - - - - 377

PROMISSORY NOTE.

See Bills of Exchange.

PURCHASER.

See Court of Chancery, 7, 8, 12.

— Mortgage.

RECORDING.

See Mortgage.

RELEASE.

See Guardian and Ward.

REMAINDER.

See Wills and Testament, 1, 2.

RENT CHARGE.

See Annuity.

REPLEVIN.

1. Where a replevin had been struck off upon the motion of the plaintiff, and an action upon the replevin bond had been instituted, the defendants, (the plaintiff in replevin and his securities) suffered judgment to go by default; they were, notwithstanding, permitted, upon the execution of a writ of inquiry, to assess the plaintiff's damages, to show they had title to the articles replevied, in mitigation of damages. *Belt vs. Worthington*, - 247
2. The object of the law in prescribing that a replevin bond should be entered into by a plaintiff before he should have the writ, was only to indemnify the defendant. The action upon that bond being *sui generis*, ought to be so moulded as best to subserve the principles of justice, having a regard to the rights decided in the replevin, and the nature and character of the bond.

Ib.

SCIRE FACIAS.

See Execution, 1.

SCRAWL.

See Bond, 2.

SEAL.

See Bond, 2.

SEPARATE ESTATE.

See Feme Covert.

SET-OFF.

See Court of Chancery, 14, 15.

SHERIFF.

See Collector of Taxes, 1, 2.

SLANDER.

In an action of slander, it appeared that the defendant had charged the plaintiff with having forged the following instrument, which it was alleged, had been delivered to defendant's slave, to assist his escape: "Know all men by these presents, that the said negro boy was the property of my uncle R. living near, &c. He died without any heirs; he never was married, therefore he made all his negroes free, by will and testament. This boy's name is S. He always behaved honestly and industriously; is a good hand about horses, and a good wagoner. The farmers in our part have, for common, all slaves or hands of their own, therefore he wants to try some other part. The commissary's office at F. will prove his freedom. Witness, &c. I. (Seal.)" HELD, upon demurrer, that this instrument, if genuine, might have prejudiced 'I,' by subjecting him to a claim for damages to the owner of any slave to whom it might have been given, or to a criminal prosecution, if such slave absconded; that it was therefore the subject of forgery at common law, and sustained the action. *Arnold vs. Cost*, 221

STATUTE OF FRAUDS.

1. E, tenant for life, permitted H to cut a ditch through her land, to supply his mill with water. Upon the death of E, a verbal agreement was made between the remainderman and H, for the purchase of the ditch, and the amount of the purchase money was to be ascertained by certain arbitrators. An award being made, H filed his bill for a performance of this agreement. The defendant's answer admitted the facts, but relied upon the statute of frauds as a bar. HELD, there was no part performance, and the contract could not be enforced. *Hamilton vs. Jones*, 127
2. A sheriff's return to a *fi. fa.* which reports a sale of lands, or his deed to the purchaser under the execution, is a sufficient memorandum

in writing within the statute of frauds. It is not necessary that the return should be endorsed on the writ, or the deed executed at the time of the sale. *Hanson vs. Barnes*, - - - - - 359

See Court of Chancery, 5.

SURETY.

- See Action—right of, 1.
— Evidence, 1, 3, 4.
— Estoppel, 1.
— Practice, 12.

SURVIVOR.

See Wills and Testament, 3.

TENANTS IN COMMON.

It is an essential attribute of a tenancy in common, that there should be a unity of possession; wherever, therefore, the tenure of the estate intended to be conveyed indicates a holding in severalty, or by particular or specific description, a tenancy in common cannot exist. *Blessing vs. House*, 290

TENDER.

An offer to pay only a part of a sum due, cannot avail a party as a tender. A creditor is under no obligation to accept less than the full amount due him. *Fridge vs. The State*, - - - - - 103

TIME.

- See Evidence, 17, 18.
— Pleas and Pleading, 5.

TRESPASS.

1. F sold a tract of land to W, reserving the grain then in the ground. This was to be thrashed in the barn, and the straw left for W's use. While the grain was growing, F sold it to M, who had notice of the first agreement. M cut the grain and stacked it upon the farm, but afterwards entered upon the premises then in the possession of W, and hauled away the grain in the straw before it was thrashed, thrashed it, and did not return the straw. In an action of trespass *q. c. f.* brought by W against M—HELD, that if the jury believed M's entry was for the purpose of removing the grain and thrashing it off the premises, that it was a trespass.

pass *q. c. f.* and the plaintiff might recover damages for that, and the straw which was removed and not returned. *Moats vs. Wilmer*, 118

2. Where a party is a trespasser or not, according to the intention with which he enters upon land, then, whether he is a trespasser or not, is a question for the jury exclusively. - - - - - *Ib.*
3. Acts which amount to trespass *vi et armis*, and which are a component part of one outrage, may be united with a claim for the trespass *q. c. f.* and damages for both recovered in the same action. - *Ib.*

TRESPASS UPON THE CASE.

See Slander.

— Malicious Arrest.

TRUST.

See Court of Chancery, 6, (b) 17.

— Feme Covert, 1 to 4.

— Insolvent Debtor.

— Limitations, 5.

— Trustee, 1, 2, 3.

TRUSTEE.

1. The policy of the law forbids that a trustee should become a purchaser, directly or indirectly, at his own sale; and if he does, such sale may, and will be set aside, on the proper and reasonable application of the parties interested. *Richardson vs. Jones*, - - - - - 163
2. The rule, that a trustee shall not become a purchaser at his own sale of the trust property, was not adopted in favor of trustees, but for the protection of the interest of the *cestui que trust*. - - - - - *Ib.*
3. Where trustees act *bona fide* and with due diligence, they have always received the favor and protection of Courts of Equity, and their acts are regarded with the most indulgent consideration.— Where they have betrayed their trust—grossly violated their duty, or been guilty of unreasonable negligence, their acts are inspected with the severest scrutiny, and they are dealt with according to rules of strict, if not of rigorous justice. *Diffenderffer vs. Winder*, 311

See Insolvent Debtor, 1, 2, 3.

USURY.

1. Upon a plea of usury to an action

upon a single bill, it appeared that the bill had been given upon a settlement of an account, which contained items of debt and interest. In two of the items, the interest as calculated, exceeded 6 per cent. The receipt for the bill at the foot of the account, stated, that in "case of error either way, should any be discovered," it should be corrected. HELD, that this was no evidence of an usurious agreement. *Stockett vs. Ellicott*, - 123

2. Every case of usury must depend upon its own circumstances. It is the intention, and not the words used, that gives character to the transaction; and that intention, when it can be reached, must govern. Where the real truth and substance is ascertained to be a loan of money, a lending on one side, and a borrowing on the other, at a rate of interest exceeding six per centum, the form given to the transaction is not material; no shift or device can take it out of the Act of Assembly. - - - - - *Ib.*

3. Z being insolvent, and desirous to raise money, applied to F, and obtained his promissory note for \$250, payable 60 days after date to Z, for the purpose of selling it to raise money. No consideration was paid for the note. Z endorsed the note in blank, sold and delivered it to the plaintiff, who was ignorant of its being a lent note, for the sum of \$200. The maker of the note was in good circumstances. HELD, that this note was usurious and void. *Cockey vs. Forrest*, 482

VARIANCE.

See Pleas and Pleading, 11.

VENDITIONI EXPONAS.

See Execution, 5.

VOID AND VOIDABLE.

See Confirmation.

WILLS AND TESTAMENTS.

1. It is a general rule in the construction of wills, that a limitation which may operate as a remainder shall not be construed an executoary devise. *Hoxton vs. Archer*, 199
2. Tenant in fee, on the 8th May, 1775, devised as follows, "I give and bequeath the whole of my es-

tate, both real and personal, unto my five daughters, to them and their heirs for ever, to be equally divided amongst them; and it is my will, that if either of the said children, die without issue lawfully begotten of their body, in that case, the part of the said child be equally divided among my surviving daughters." **HELD**, that this will being made before the act to direct descents, the devisees each took estates tail general, with cross remainders in fee, under the limitation over to the survivors. - *Ib.*

3. It is a general rule, that where there are no particular and sufficient words used for that purpose, surviving shares in a devise of real property will not, upon the decease of one who took as a survivor, survive again. - - - - - *Ib.*
See Annuity.

WITNESS.

See Evidence, 1, 2, 3, 4, 10, 11, 12, 13.

WRITS.

See Pleas and Pleading, 1, 2.





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